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CONVEYANCER'S NOTEBOOK.

A word of explanation about the date of appearance of this magazine may be called for. Subscribers will know that it was our intention to bring it out on the four quarter days of the year. Particularly in the last two years this has resulted, alas! in the number appearing even weeks late. It is no doubt realised that this is due in no small measure to the difficulties of printing and of postage, which makes it peculiarly hard for contributors of regular features, such as notes of cases, to get their contributions to time. To mitigate these delays the publishers have decided to issue each number as near to the beginning of the month as possible. We should mention that this has one drawback. The notes of cases are thereby driven back to an earlier period than formerly: so, for example, a March issue will not include cases reported much later than the first week in February. Any subscriber who has knowledge of the present printing difficulties, will appreciate that this step has been more or less forced upon us by the exigencies of these times.

Being a journal dealing with the Law of Property and Conveyancing and not with general issues we are not usually concerned with such topics as constitutional law, though in fact much of our constitution is the off-shoot of our law of property. Nevertheless, since respect for property has always been treated

as part and parcel of personal liberty, and in ancient days even lack of freedom, we cannot forbear from repeating certain noble words of Lord Atkin in his dissenting speech in *Liversidge* v. *Anderson*, 110 L. J. K. B. at p. 743. He said: "In this country, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the Executive; alert to see that any coercive action is justified in law."

We are not concerned with political issues, much less do we wish to associate ourselves with any political party, but respectfully we say that these are words of ripe wisdom in the Common Law. As a sober statement of historical fact, we must find that behind the inspiring front of parliamentary institutions and the appeal of an equal franchise the solid rock of English democracy is founded on the impartial authority of the Judges, "no respecters of persons", to deal justly with all men. It is for this in essence that the Civil War was fought and won, and why the arbitrary government of Cromwell, so enlightened in many respects, was doomed to failure. In its day and generation Parliament could be as arbitrary as the monarch whose power it had curtailed. It is only necessary to refer to such cases as *Wilkes* v. *Wood*, 19 St. Tr. 1153; *Entick* v. *Carrington*, 19 St. Tr. 1030; *Stockdale* v. *Hansard*, 9 Ad. & E. 1; *Bowles* v. *Bank of England*, [1913] 1 Ch. 57, to give illustrations of acts authorised or approved by our elected Chamber affecting the person, reputation or property of the subject which have been held illegal by the Judges. These are isolated incidents in our constitutional history and should be regarded only as warning beacons. It is our opinion that the reason for the survival and success of English democracy, while continental governments, based also on wide franchises and parliamentary institutions, have proved fruitless and gone down into the ditch, lies very much in the implicit recognition during our parliamentary history of the province of the law Courts. The person, reputation and property of the subject and their protection has been essentially a matter for the ordinary Courts, and interference by legislation should be reduced to a minimum. Changes in the law are necessary to meet the growth of new modes of living and new moral outlooks and for these a legislative machine is necessary. Possibly a popularly elected legislative machine might be most effective to promote these changes in the interests of the community. But this is not really

English democracy. The existence of this legal control prevents over-hasty administrative action as well as tyrranous or arbitrary interference. The publicity of litigation in this country makes any administrator pause before attempting to strain the law in pursuance of some administrative policy. The Judges are free from all political controversy and are disinterested in administrative policies. Such a tribunal is a check not only on over-hasty action but upon the gradual infiltration of a method of government alien to the real wishes of the community.

No student of the modern trend of legislation in that middle course between public and property law, such as housing, town planning, and ribbon development, can be unaware of a dangerous tendency in this field to overlook this substantive principle of constitutional law. When a final decision is left to a "Minister" it is almost impossible to expect the same disinterestedness and disassociation from "policy". It is, after all, the function of administration to have a policy, and to carry it out, but the law Courts should ensure that it is carried no further than the law allows. It is probably impossible to draw a distinction between respect in property, person and reputation. Restraints on all these must come, and in days of such stress as these it is particularly obvious that this must be, but we doubt whether any political philosophy has been able to produce a working hypothesis in which regulation of the one did not automatically involve directly or indirectly the regulation of the other. On the foundation of respect for person, property or liberty enforced and protected by the Courts our system of government has been laid, whatever the needs of the future may hold, and we should be grateful to Lord Atkin for his modern enunciation of this principle. If we are to make changes let us do so with our eyes open.

Leaseholds comprised in a settled residuary gift—rule in Howe v. *Dartmouth.*—For more than a hundred years, equity has paid special attention to settled gifts of residue. Unless the will shows a contrary intention, equity has assumed that the testator wished the scales to be held evenly between successive beneficiaries. And this assumption has led to the further assumption that he wished any "wasting or hazardous" property, comprised in the gift, to be converted into permanent and reliable investments. Thus arose the rule in *Howe* v. *Dartmouth* (1802), 7 Ves 137 a; and on this reasoning proceeded the host of subsequent decisions in which the

rule was developed. A subsidiary limb of the rule requires an apportionment of any income received, pending the desired conversion. The present note, however, is concerned only with the prime object of the rule—the implied duty to convert.

The rule in *Howe* v. *Dartmouth* was ultimately held to be inapplicable to any freeholds comprised in a residuary gift. But leaseholds, and any pure personalty not invested in trustee investments authorised by the general law or by the will itself, have been uniformly regarded as " wasting or hazardous " within the meaning of the rule. There was therefore an implied duty to sell them. As was pointed out in a former note (*ante*, Vol. III, pp. 236—240), the question whether the rule still operates, as it did before 1926, to raise a trust for sale respecting any *leaseholds* comprised in a settled residuary gift is not without practical importance. If anything in the Property Acts of 1925 has robbed the rule of its power in this respect, such leaseholds are " settled land ", and so attract the imposing paraphernalia of vesting assents and the like. But if the rule has still its ancient power (or if the will has imposed an express trust for sale upon the residue), much of this modern subtlety is avoided; for such leaseholds are not then " settled land " within the meaning of the Settled Land Act, 1925.

The former note on this topic, mentioned above, was written in the belief that nothing in the Property Acts can be said clearly to deprive leaseholds of the trust for sale which *Howe* v. *Dartmouth* formerly imposed upon them, and in the knowledge that this view is not universally accepted. The suggestion was therefore offered, for cases where the will itself does nothing to clarify the situation, that personal representatives are able to evade the problem altogether if they are prepared to retain any such leaseholds in their own hands until the life interest ends: see Administration of Estates Act, 1925, s. 39 (1).

A learned correspondent now raises the question whether leaseholds, *having sixty or more years unexpired*, are not excluded from the rule in *Howe* v. *Dartmouth*, as a consequence of section 73 of the Settled Land Act, 1925. This section permits " capital money arising under this Act " to be invested in the purchase " of leasehold land held for sixty years or more unexpired at the time of purchase ". It will be remembered that section 28 of the Law of Property Act, 1925, gives to trustees for sale " in relation to land . . . and to the proceeds of sale . . . all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act ". Moreover, personal representatives now have, " for purposes of administration, or during . . . the subsistence of any life interest ", all the powers of trustees for sale: Administration of

Estates Act, 1925, s. 39 (1). It therefore appears to follow that personal representatives have power to invest "capital money" (within the meaning of the Settled Land Act) in the purchase of leaseholds having at least sixty years to run. This does not mean, of course, that personal representatives or trustees have any general power to invest moneys, from whatever source, in the purchase of such leasehold property, for the Trustee Act, 1925, designedly omits such purchases from its list of authorised investments. But it does appear to mean that any money analogous to "capital money" within the Settled Land Act can be so employed. Accordingly, if a settled residuary gift includes leaseholds, the personal representatives have power to invest the proceeds of sale of such leaseholds (though not any other personalty) in the purchase of leaseholds having at least sixty years unexpired. It therefore appears to follow that any leaseholds of that length, which are already comprised in the settled residue, rank in a sense as investments authorised (or at least semi-authorised) by law.

If leaseholds having at least sixty years to run are, in this limited sense, "authorised" investments within the meaning of the rule in *Howe* v. *Dartmouth*, does it follow that the rule cannot now impose upon them a trust for sale? It is well established that no investment authorised by law can be termed "hazardous" for the purposes of that rule. But leaseholds fell within it owing to their "wasting" character—not on account of anything hazardous about them: see Kekewich, J., in *Re Bates*, [1907] 1 Ch. 22, 27—28. And the classic statement of the rule by Baggallay, L.J., in *Macdonald* v. *Irvine* (1877), 8 Ch. D. 101, 112, emphasising that it aims at a conversion into "permanent" investments of a recognised character, appears to stress this distinction for our purposes. Accordingly, there was some conflict among the decided cases as to whether, where "wasting" assets are concerned, an express power to retain existing investments operates (as it undoubtedly does with "hazardous" assets) to exclude the *Howe* v. *Dartmouth* rule. Eventually, however, the settled opinion came to be that there is no good reason for distinguishing "wasting" from "hazardous" assets in this respect: see *Re Nicholson*, [1909] 2 Ch. 111, not following *Porter* v. *Baddeley* (1877), 5 Ch. D. 542. It would therefore seem to follow that section 73 of the Settled Land Act, by making long leases permissible (to some extent) as an investment, has removed them, despite their "wasting" nature, from the scope of the rule.

Incidentally, the fact that the Property Acts tend to exclude from the rule leaseholds with sixty years unexpired, is of some interest from another angle. There have been occasional hints in

reports and text-books that the Judges, even before 1926, might have been willing to hold that *Howe* v. *Dartmouth* applies only to short leases: *e.g.*, *Re Wareham*, [1912] 2 Ch. 312, 317; *Jarman on Wills* (ed. 1910), 1243. In fact, apparently, no definite judicial pronouncement was ever actually made on the point. Perhaps the Judges hesitated to draw an arbitrary line, beyond which a lease would cease to be a "wasting" asset in the eye of the law. The Property Acts, as we have seen, have now indicated where this line might fittingly be drawn, and have themselves drawn it. Consequently, unless the will has imposed upon the settled residue an express trust for sale, any residuary leaseholds having at least sixty years unexpired are "settled land". But any shorter leases comprised in the residue appear still to fall within the scope of the rule: it is submitted, therefore, that these are held upon trust for sale.

It is perhaps unnecessary to add that, so long as uncertainties beset the question whether *Howe* v. *Dartmouth* has been shorn of its former power to impose a trust for sale upon short leases comprised in a settled residuary gift, such gifts should be drafted with special care. It is submitted that one ought either to employ an express trust for sale, or to add words which (as in *Gray* v. *Siggers*, 15 Ch. D. 74) clearly imply that the leaseholds are intended to be retained *in specie*. If this is done, the personal representatives will have no difficulty in deciding whether the leaseholds are "settled land" or no.

S. J. Bailey.

THE DEMERITS OF REGISTRATION OF TITLE.

By H. J. Randall, LL.B., F.S.A.

Dr. E. O. Walford, in the June number of this journal, has taken the opportunity afforded by a review of the third volume of the new edition of *Key and Elphinstone* to sing a loud pæan in praise of the Land Registry and all its works. Dr. Walford states that in "an endeavour fairly to weigh the position" he has collected together "such objections as might appear to be tenable", but in my view the objections do not carry very far. Two only are given the honour of separate headings in italics though others are suggested incidentally. He mentions in relation to inquiries

addressed casually to practitioners that in his experience the only objections which can be taken seriously are:—

(i) That the practitioners in question do not like registered titles because they do not understand registered conveyancing; and

(ii) that the costs allowed are insufficient in the case of registered land.

In my opinion the objections to registration of title are not confined to such mint and anise and cummin, but are weightier matters of opinion.

Of course Dr. Walford repeats the stock argument against our ancient system of conveyancing, the abstract of title the length whereof bears no proportion to the value of the property. No case in favour of registration of title would be complete without it. It may be admitted frankly that such things do occur occasionally and they are particularly vexatious when the property is small, but the inference that they are common is, in my experience, incorrect. The long abstracts occur principally in the case of certain large landed estates with numerous settlements and innumerable mortgages, but even so the difficulty in country districts at least, is of small dimensions. In an ordinary country town there are probably some half-dozen large estates from which numerous titles are derived, but the titles are all perfectly well known to the practitioners in the neighbourhood and the difficulty that they cause is of the smallest, though when they have to be dealt with outside the district the difficulties are increased.

In the course of a lifetime passed in the practice of conveyancing the present writer has only on one or two occasions ever seen a thirty-page abstract. Such things do exist, but even in the instances of large landed estates the titles are often surprisingly simple. In one well known to the present writer it is necessary to go back to a settlement made in 1866 in order to find a convenient root of title, but even then the abstract only runs to four and a half typewritten pages. It is not the cue of the advocates of land registration to mention the multitude of titles that are so simple that it is difficult to think of anything that would justify the accustomed ceremony of delivering requisitions on title, but they far outnumber the difficult titles, and the bad titles are so rare as to be negligible. The fact is that landowners really do own the land that they possess, and they can usually prove the fact without difficulty. "In few cases is any title open to any real objection" (*a*).

(*a*) "J. M. L." in the *Law Journal*, Jan. 24, 1942, at p. 27.

It is equally the cue of the advocates of land registration to deprecate the provisions of the property legislation of 1925. In truth this beneficent legislation has simplified examination of title immensely. Even in large and much mortgaged estates the post-1925 abstracts of title are infinitely shorter and more simple than the pre-1925.

The abolition of legal tenancy in common, of copyhold tenures (*b*) and the substitution of the succession of conveyance, mortgage, probate and assent is a simplification that has removed all the terrors and most of the difficulties of a pre-1925 abstract of title. At the same time no one could suggest that this great piece of legislation had attained perfection. Some of the unforeseen results exemplified by the decision in *Re Kempthorne* ([1930] Ch. 268) have resulted in positive injustice, and the registration of charges has introduced some new perils. But the advantages are enormous, and few would willingly return to the pre-1925 conveyancing.

The greatest difficulties are caused by the Settled Land Act, but they are inherent in the subject-matter and had to be faced by the designers of the 1925 legislation. They are especially trying when a small property is converted into settled land by a home-made will. It would have been neater, more logical, and may we add more urban, to have converted all trusts into trusts for sale, but the whole feeling of the landed gentlemen was averse to any such sweeping change. It is impossible to imagine a belted earl, much less a duke, as a mere annuitant dependent upon trustees. The Settled Land Acts are among the last strongholds of the countryside against the flowing tide of urbanisation. The Settled Land Acts were intended for the country estates, and the difficulties occur when they are applied as a matter of construction to the workman's cottage.

A point that has not been emphasised by the opponents of registration of title is the fact that all is not as lovely in that particular garden as its advocates would have us believe. Dr. Potter has brought out many such matters of detail, but on this occasion it seems better to discuss general matters of principle rather than details.

I am writing avowedly from the standpoint of the country practitioner, and my first objection to the Land Registry is that

(*b*) The writer had to deal with one case before 1925 where some of the property was held in shares of 1/128ths and there were nineteen vendors. Even then the title was not really difficult, but it was certainly complicated.

It is curious that the advocates of registration of title never refer to the centuries-old system of registration of titles of copyholds. It was cumbersome and costly, but often most useful. The real objection to it was that it was carried out by stewards of manors and not by bureaucrats.

it suffers from an exclusively urban, or one might say, suburban mentality. Its ideal subject is a rectangular plot of land without any particular character of its own of which any surveyor with a drawing pen and a ruler can make a satisfactory plan. Of land with its own individuality, of the customs of the country, of the methods and practice of agriculture or forestry, the Registry knows nothing and seems to care less. A concrete example will be better than any general argument. An owner of a landed estate imbued with Benthamite ideas had registered his estate voluntarily with absolute title. He imagined that he had thereby simplified everything, and disposed of every possible source of trouble and even of question. Many years later he had to deal with the Forestry Commission, and had the honesty to record his complete disillusionment in a letter to *The Times*. Subsequently I had to deal with part of the property on behalf of a purchaser, and following the usual practice in the case of agricultural property I prepared a detailed schedule, with a copy of the Ordnance Survey Map attached, recording each field, with its name, its state of cultivation, its area, its Ordnance Survey number, and the total area of the farm. The thing that I received in return was the usual messy piece of typewriting and a plan from which every vestige of information had been deleted except the boundaries of the farm and the fields. I protested vigorously, but the utmost concession that I was able to obtain was the restoration of the Ordnance Survey numbers and areas to the plan. My schedule was swept away completely even to the total area of the farm. Except by the process of extracting the area of each field from the plan and adding them up, the owner could not ascertain from his document of title the area of his property, nor could an agricultural valuer find the state of cultivation at the date of purchase. The field names were treated as an irrelevant piece of antiquarianism. I handed the document to my client with a deep sense of shame that the elegant art of conveyancing should sink to such depths of fatuity and incompetence.

The Land Registry, far from being a harbinger of future reform, is nothing but an outworn relic of a discarded mode of thought. Doubtless it is admirably adapted to the needs and methods of the land speculator. The procedure known as " developing " an estate consists in its essence of cutting up land (often good agricultural land) into rectangular plots, building houses upon the plots, and with the aid of a building society disposing of them to the public. The speculator, the builder, and the building society all secure profitable business, and only the purchaser sometimes feels regrets.

The Land Registry finds the process entirely congenial because

it need think of nothing but its beloved rectangles, but others may doubt whether adapting our whole system of conveyancing to the particular needs of the land speculator is an essential part of the new world to be built after the war. There may be others whose needs and views are quite as worthy of consideration and may even be more worthy members of the community.

The Land Registry is a product of the period of Benthamite individualism and its ideal is expressed in the slogan "free trade in land". The first permissive act on the subject was passed in 1862, the main statute in 1877 and the compulsory act in 1897 (*c*). The last was mainly due to the influence of Lord Halsbury, a Victorian common lawyer whose interest in the countryside was negligible, and whose knowledge of conveyancing was of the smallest.

The ideal upon which this policy is founded is that land should be "capable of transfer with the same simplicity as a pound of tea, or no matter how many pounds of stocks and shares" (*d*). Land, in short, is a commodity, and it should be capable of being bought and sold with the same ease and cheapness as other commodities.

Against this view the soul of the countryman revolts to the very depths of his being. Every piece of land has its own individuality, none is exactly like any other, each one is a thing apart to be cherished because of its idiosyncrasy, but never to be disposed of except under the pressure of overwhelming necessity. On a previous occasion I expressed the position in these words (*e*): "The rural mind regards land as a possession, not a commodity; as the one substantial foundation of life, not as an investment to be changed at will; as the perfection of all things, not a mere means to other ends. The agriculturalist is quite willing to buy land within the limits of his means, for all agricultural countries are affected by land hunger in a greater or lesser degree, but to sell the land is a calamity. It is not a mere change of investment, it is tearing up the family by the roots. The rural family is devoted to the soil, its whole being is sunk deep in it, it can hardly envisage existence apart from it, its ideal is that son should succeed father in infinite succession. It is a perverse error to suppose that this feeling is confined to the great landlords".

The whole feeling of the countryside is in favour of stability, to have and to hold, not to buy and re-sell. To that outlook the small difference in cost between the transfer of registered and

(*c*) Dicey. *Law and Public Opinion in England*, 1st ed., p. 201.
(*d*) "The Merits of Registration of Title", at p. 248.
(*e*) "The Spirit of the New Property Legislation", *Edinburgh Review*, July, 1927, p. 128.

unregistered land is negligible because the occasions are so infrequent. Moreover, a deep sentiment and an historical interest attaches to a parcel of title deeds that may contain the history of the property for a century and more; it is no small part of the family treasures. To a land certificate no such sentiment or interest could possibly attach itself. It is remarkable how this stability manifests itself not only in the rural areas but in the towns where the rural sentiment survives. Two recent instances within the experience of the present writer may serve to illustrate this point. In 1938 a property that had been in the possession of the same family since about 1874 was sold. The remarkable feature of the title was that a mortgage created in 1876 had stood uncharged since that time. The property held by one family and the mortgage held by another family and both subsisting together for more than sixty years! In the other instance a miner had bought a house to live in in 1890 when he was a young man. He lived there all his life and after his death in 1940 the house was sold by his personal representatives, and the only documents of title were the assignment of 1890 and the probate of his will. Does anyone suppose that free trade in land makes any appeal at all to people like this?

From the historical standpoint registration of title is an unmitigated calamity. Title deeds are the principal records upon which the local historian relies, and under the beneficent direction of the Master of the Rolls they are being treasured as they have never been treasured before in special repositories that local patriotism is erecting and maintaining all over the country. If they are to be superseded by instruments of transfer that give the minimum amount of information, which may or may not be open to the inspection of students at some undefined future time, the resources of the local historian will be meagre indeed. They are most unsatisfactory historical documents in any case because in addition to their brevity they contain no recitals. Recitals often supply the historical inquirer with the very clues for which he is anxiously searching. We are living in a time of rapid change and our records will be of the greatest interest to the historians of the future. It may well be asked whether we have any moral right to deprive them of their essential instruments. To the Benthamite mentality history was of small interest and less value, and the Land Registry is a typical product of that mentality. We live in an age of great historical activity, and it is not a small matter that our actions should be cursed by our successors.

Much more could be said, but it is time to make an end. If the people who live in towns and deal in rectangular plots wish to

employ the machinery of the Land Registry, let them do so. The matter is within its capacity; though there is no evidence of any vociferous demand for the extension of its activities, and the local authorities maintain an obstinate silence. But at least let it be prevented from fastening its ugly talons into the fair face of the English countryside.

POSTPONING SPECIAL POWERS OF APPOINTMENT TO MORTGAGES OF REVERSIONS.

By A. H. Withers, Barrister-at-Law,

This article points out some effects of postponing special powers of appointment so as to enable reversioners to mortgage their interests under trusts in default of appointment. It seems unlikely that such effects are fully appreciated by the advisers of persons postponing such powers.

1. This article throughout assumes the following facts which are typical. On the marriage of H and W a trust fund is settled on them successively for life, with remainder to the children and remoter issue of the marriage as H and W or the survivor of them appoint, and subject thereto upon trust equally for the children of the marriage who attain twenty-one, etc., with or without the usual hotchpot clause. H (the husband) has died and the power of appointment has not been exercised. The trust fund is worth £50,000. There were only five children of the marriage, all of whom are alive and have attained twenty-one. A, one of such children, desires to raise money on his reversion. W refuses to exercise or release her power of appointment. A mortgages his expectant one-fifth share under the trusts in default of appointment, *i.e.*, to £10,000, in reversion expectant on the death of W who concurs in the mortgage either to postpone her power of appointment to the security thereby created, or to covenant that she will not exercise such power to the prejudice of such security. The form of mortgage limits the security of the mortgagees to the trusts in default of appointment, and does not allow W to appoint to the prejudice of the mortgagees, or to A in aid of the mortgage. The decision in *Evered*, [1910] 2 Ch. 147, applies to some of the points dealt with below.

2. The effect of W, the donee of the special power of appointment, postponing or otherwise restricting exercises of her power of appointment, depends on the extent of the restriction and on the existence or absence of a hotchpot clause.

(A) Where there is no hotchpot clause.

Any unappointed trust funds go, under the trusts in default of appointment, to the children of the marriage equally. To enable one of such children to get under such trusts a defined share of the trust fund, each other child must under such trusts take a similar share. If the restriction requires that A shall have the whole of his presumptive aliquot share of £10,000, *i.e.*, the share he would have taken if the power were never exercised, the power of appointment has been wholly released. If the restriction requires that A (and consequently each other child) shall have a definite share (say £4,000), less than a full aliquot share of the whole fund, the power of appointment remains only exercisable over so much of the fund as remains after each child has received the prescribed definite share, *i.e.*, after such children together have received £20,000.

(B) Where there is the usual hotchpot clause requiring that (in default of appointment to the contrary) each child claiming under the trusts in default of appointment shall bring into hotchpot benefits appointed to him or her or to his or her issue.

The restriction provides that A shall, under the trusts in default of appointment, take a definite share of the fund. Under such trusts such share must be taken by A and a similar share must be taken by each other child who and whose issue take nothing by appointment or take only under appointments expressly made free of the hotchpot clause.

The donee of the power may appoint a similar share to any other child (*i.e.*, a child other than A, the named child favoured by the restriction) or to some of his issue, or settle such share on such other child for life with remainder to some of his issue, or otherwise divide up such similar share between such other child and all or some of his issue; and, unless the appointment otherwise provides, such appointment operates, under the hotchpot clause, as if all the interests appointed to such other child and his issue or to some or one of them had been taken by such child under the trusts in default of appointment.

The result is that if the restriction requires A to take £10,000, *i.e.*, the whole of his presumptive aliquot share, under the trusts in default of appointment, each other child and his or her issue

together must under appointments and the trusts in default of appointment together take a similar sum, and the power of appointment is in effect limited to appointing £10,000 to or between, or by way of settlement upon, each other child and his or her issue or some or one of them.

If the restriction requires A to take only £4,000 under the trusts in default of appointment, A must get £4,000, and £4,000 must under or in default of appointment go to each other child and his or her issue, and W is free to appoint the balance of £30,000 as she thinks fit, and to direct that appointed interests in the £30,000 shall not be brought into hotchpot. It might be assumed from the decision in *Re Evered*, [1910] 2 Ch. 147, that, in such a case, £20,000 must go under the trusts in default of appointment to the five children equally. But such an assumption would overlook the operation of the hotchpot clause which requires interests in (at least) the £30,000 to be brought into hotchpot, in the absence of contrary appointment, in the division of the £20,000 or other unappointed funds. *E.g.*, if only £4,000 were left unappointed and £11,500, *i.e.*, one-fourth of £46,000, the balance of the fund, were appointed (not free from the hotchpot clause) to each child (other than A) or to his or her issue, or by way of settlement upon such other child for life with valid remainder to his or her children, there is no need for more than £4,000 to go unappointed, and that unappointed sum must go to A, for all the other children are excluded by the hotchpot clause from taking any share of the £4,000.

3. After executing the mortgage, W cannot so exercise her power of appointment as to prevent the mortgagees foreclosing, or receiving enough to discharge the mortgage when the reversion falls into possession, or selling and giving a good title to the reversion to a purchaser.

The results of the mortgagees foreclosing, selling, or leaving the mortgage on foot till W dies are different and are separately dealt with below, it being assumed in all cases that the settlement contains the usual hotchpot clause and that no special question arises as to the incidence of costs or death duties.

4. If the mortgagees foreclose, they as assigns of A must take one-fifth of the fund under the trusts in default of appointment. Under such trusts the unappointed funds go to all the children equally, subject to the operation of the hotchpot clause. The result is that each other child and his or her issue, or some or one of them, must also take one-fifth of the fund. The foreclosure in effect destroys W's power of appointment save that W can appoint or settle all or part of the presumptive one-fifth share of each

child (other than A) to or on such child and his issue or some or one of them.

5. The mortgage may remain on foot till the death of W. During the lifetime of W, the amount eventually required to discharge the mortgage is uncertain. The amount secured by the mortgage may be reduced by the interest being paid and the principal being reduced, or may be increased by non-payment and capitalisation of interest and by delay in realising and distributing the trust fund. During W's lifetime it will be impossible to say what will be the amount required to pay off the mortgage on distribution after W's death.

If eventually one-fifth of the fund is not sufficient, or only just sufficient, to pay off the mortgage, the result on W's power of appointment is the same as if the mortgagees had foreclosed.

Assume that only £3,000 will eventually be required to discharge the mortgage. Then A or his assigns must receive at least £3,000 under the trusts in default of appointment. Each other child of the marriage and his or her issue or some or one of them, must receive at least £3,000, whether under appointments or under the trust in default of appointment. The residue of the fund, remaining after deducting £15,000, can be appointed by W as she pleases, and she can appoint that the hotchpot clause shall not apply to interests appointed in such residue.

6. In the two cases above dealt with, no special difficulty arises. But now assume that in course of time the mortgagees get tired of receiving no interest and, during the life of W, sell the reversion. If the net proceeds of sale are insufficient or only just sufficient to discharge the mortgage, the result on W's power is the same as if the mortgagees had foreclosed. But the sale may be for a sum which, after discharge of the mortgage, leaves a substantial surplus. If so, what is to be done with the surplus?

It may, of course, happen that the surplus is payable to a subsequent mortgagee, in whose favour the power of appointment has again been postponed, or that the power of appointment has been released or fully exercised in some way (which the writer does not attempt to indicate) that makes the position clear. Assuming that the position has not been so clarified, it would seem that so long as W lives and the power of appointment remains exercisable in any material manner, the mortgagees cannot distribute the surplus proceeds of sale. The trustees have no direct concern with such surplus and would usually refuse to receive the same. If the mortgagees do not pay the surplus into Court, they must invest the surplus in trustee securities and accumulate the income until the death of W, or until the position is clear. The

investments representing such surplus and accumulations of income (whether or not in Court) are hereinafter referred to as the surplus investments.

Assuming the surplus investments are not distributed during the life of W, the position at W's death would seem to be as follows:—

The purchaser from the mortgagee takes the reversion of A to one-fifth of the trust fund, subject to duties and costs. If W has not exercised her power of appointment in any material way or has effectively appointed the surplus investments to A or his issue, the surplus investments belong to A or his issue. If this convenient result does not occur, the position may be complicated. So far as the writer is aware there is no authority anywhere near the point, and the following remarks are merely the writer's very tentative suggestions as to what may some day be decided as the right way of dealing with the matter.

That part of A's presumptive one-fifth share which, after the execution of the mortgage, remained subject to the power of appointment is represented by the surplus investments. Then on the date of actual distribution of the trust fund, the value has to be taken (1) of the net trust fund, *i.e.*, after deduction of duties and costs, and (2) the surplus investments. A must be deemed to have taken under the trusts in default of appointment the amount by which one-fifth of the value of the net trust fund exceeds the value of the surplus investments. Each of the other four children and his or her issue together must take, under appointments and the trusts in default of appointment together, at least the same amount as such excess. In working out the division between the claimants, other than the purchaser, the surplus investments have to be distributed as part of the net trust fund. The distribution of the ultimate balance of the net trust fund (plus the surplus investments), remaining after payment out of the amount deemed to be taken by A under the trusts in default of appointment and the corresponding four amounts taken by the other four children or their issue, will depend on W's appointments and the operation of the hotchpot clause.

THE CONVEYANCER IN THE POLICE COURT.

By R. Graham Page, LL.B.(Lond.), Solicitor,
one time Clerk to Justices.

In an article in last quarter's issue instances were given of the impracticability of the "pure conveyancer's" isolationist policy. It was shown that he cannot ignore litigation in the county court and that he should not endeavour to escape contact with it by instructing his London agents to do all his litigation for him in the High Court.

Now let us drag the unwilling conveyancing practitioner into another court—the police court—not as an alleged offender nor yet with a view to showing him the offences which his respectable and reputable property-owning clients may, at some time or other, be prone to commit; but with an eye to those problems which do occur even in the most orderly conveyancing practices and which, unknown to many a conveyancer, can be solved by the justices.

It ought not to be the first time that our "pupil" has appeared —in his professional capacity, of course — before the justices. Unless he has taken an obstinate pride in a strictly sedentary practice and has deliberately avoided some of the easy remedies offered by the petty sessional court, he will know that there are many occasions when he can perform a useful service to his property-owning clients by taking or defending summary proceedings.

For example, let us suppose that a client owns some cottage property and desires to obtain possession of one of the cottages from a tenant who is in arrear with the rent. If the rent does not exceed £20 a year, the Small Tenements Recovery Act, 1838, s. 1, offers an easy and speedy form of ejectment by order of the justices. The essentials for bringing the case within the section are:—

(1) There must be a tenant of property coming within the description of "house, land or corporeal hereditament".

(2) That property must be held without rent or at a rental not exceeding £20 a year without a fine having been reserved.

(3) The property must be held at will or for any term not exceeding seven years.

(4) The tenancy must have been determined by legal notice to quit "or otherwise".

(5) The tenant (or if he does not actually occupy the premises, then the person who does) must have neglected or refused to quit and deliver up possession of the premises.

(6) There must be no circumstances whereby the premises remain controlled under the Rent, etc., Restriction Acts.

(7) The landlord or his agent must have served the person so neglecting or refusing with the prescribed written notice of intention to apply to the justices (at the expiration of seven clear days from the service of the notice) for a warrant for possession.

There are one or two matters which need careful attention with regard to the service of the notice. The notice must be served personally on the person "neglecting or refusing" or by leaving the same with some person being in and apparently residing at the place of abode of the person "neglecting or refusing". Furthermore, mere service of the notice is insufficient; it must be read over to the person served or the person with whom it is left and the purport and intent of it must be explained. Personal service and reading over can only be avoided if the person holding over cannot be found and his place of abode is not known or admission to it cannot be obtained for serving; in such a case the notice may be posted on some conspicuous part of the premises.

It may be that the usual notice under the Courts (Emergency Powers) Acts, 1939 and 1940, need not be served (see 103 J. P. N. 664, 683) but it is probably safer to serve it and dispel any doubt on the point.

If those seven essentials are present, then the justices at the hearing are empowered (upon proper proof and provided that the tenant does not appear and show reasonable cause for not giving up possession) to order the issue of a warrant for possession within a period to be named in the warrant, not less than twenty-one nor more than thirty days from the date of the warrant.

Here, then, is all that the "pure conveyancer" need do (once the tenancy has expired) to obtain such an order from the justices:—

Ascertain from the justices' clerk the day on which the case can be heard:

Draft the specified form of notice to the effect that his client proposes to apply to the justices for a warrant:

Give the justices' clerk a copy of the notice and arrange for the notice to be properly served:

Attend the court on the appointed day supported by the necessary witnesses and documents to prove the tenancy,

the determination of it (*e.g.*, by service of a notice to quit), the fact of a holding over, the exception of the premises from the Rent, etc., Restriction Acts (*e.g.*, by non-payment of rent), the service and reading over and explanation of the notice.

It is useful also to be armed with some evidence of the tenant's circumstances and means because, although the justices have no discretion to refuse the warrant if the case is duly proved, they might call the Courts (Emergency Powers) Acts in aid and delay the execution of the warrant if they felt that the landlord was being unconscionably harsh on an unfortunate tenant. Even if one satisfied the bench that the Acts do not apply to cases under the Small Tenements Recovery Act, 1838, the justices could delay the warrant by adjourning the case for decision at a later date.

The justices have no power to make an order for costs when directing the issue of a warrant—but that should not frighten the litigant away. Orders for costs in small possession cases in other courts are very rarely productive.

What could be more simple than this procedure? Also, it has one main advantage—namely, that the case can speedily be brought to a hearing. Towns that have county courts once every two or three months usually have petty sessional courts once a week or once a fortnight. There are ways and means of arranging an early hearing, even in towns where the petty sessional court sits only once a month. A friendly word with the justices' clerk may bring about a special sitting for disposal of the possession case with a few other small cases waiting to be heard. Extra sittings affect, indirectly but favourably, the salary of a part-time justices' clerk!

That last remark is not a cheap joke at the expense of justices' clerks in general. It has a deeper meaning for the practitioner. In towns where there is a full-time justices' clerk and there are daily sessions the practitioner has no difficulty in arranging an early hearing of cases in which he is involved. In towns where the sessions are monthly or fortnightly, the part-time clerk will be a brother solicitor whom the practitioner often meets on other matters and with whom he will have no difficulty in arranging a special session which will relieve the pressure on the usual monthly or fortnightly sessions—especially if the case is likely to be a long one, or if someone other than the police is prosecuting, *e.g.*, a representative of a Government Department. Perhaps the best examples of such cases are found amongst those affecting farm land. Such cases frequently arise in the country courts, involving the landowner and his "purely conveyancing" solicitor.

To mention only two of the cases which give rise to summary proceedings relating to agricultural land:—

(1) The Ministry of Agriculture and Fisheries serves a notice on the occupier (and, if the occupier is a tenant, on the landlord as well) requiring him to cut down and destroy injurious weeds. The occupier or owner does not consider the notice justified for some reason or other. What is he to do if, despite his representations, the Ministry declines to withdraw the notice? Let the Ministry take proceedings before the justices for non-compliance with the notice, put forward his defence in that court and leave the matter to be decided in a summary manner before persons who, no doubt, have a good knowledge of farming in the district and the practical difficulties of the local farmer.

(2) The County War Agricultural Executive Committee by virtue of the Cultivation of Lands Order, 1939, made under the Defence (General) Regulations, 1939, serves a notice upon the occupier of a field to plough up the land not later than a certain date and prepare for and plant a certain crop not later than another date mentioned. What is the occupier to do if he sincerely believes that the carrying out of the terms of the notice would be contrary to all rules of good husbandry? If the Committee is adamant and refuses to entertain his objections he must leave the matter for decision by the justices when he is summoned before them at the instance of the Committee.

Many of these agricultural cases (such as the example given above relating to injurious weeds) are closely akin to proceedings for abatement of a nuisance. A knowledge of summary procedure for abatement of nuisances is invaluable even to the conveyancing practitioner, not only because the lack of such knowledge prevents the giving of adequate advice to a defendant-client who is threatened with an abatement notice but also because a lack of such knowledge must often have resulted in a potential complainant-client patiently suffering an injustice by reason of the fact that his well-meaning solicitor has dissuaded him from embarking upon an expensive High Court action for damages and an injunction. There are too many practitioners who associate proceedings arising out of a nuisance with the Courts in the Strand or at the assizes and with injunctions and criminal indictments, forgetting the simple summary procedure which can be adopted in the local petty sessional court.

It is true that the initiation of the proceedings will not be in the hands of the offended client and that the first step is to set the powers of the local authority in motion, but it should not be difficult to persuade the local authority to exercise those powers

if the client has just cause for complaint about some unneighbourly conduct on the part of an adjacent landowner.

The powers which the local authority can exercise are given by the Public Health Act, 1936, s. 92; the section itemises certain "statutory nuisances", the most common of which are—

"(a) any premises in such a state as to be prejudicial to health or a nuisance;

(b) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;

(c) any accumulation or deposit which is prejudicial to health or a nuisance."

If the local authority is satisfied that a statutory nuisance exists, the authority should serve an "abatement notice" on the person by whose act or default or sufferance the nuisance arises or continues or, if that person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the nuisance or execute such works and take such steps as may be necessary for that purpose. If the nuisance arises from a structural defect, then the notice must be served on the owner of the premises.

The whole procedure can be short circuited if the person causing the nuisance cannot be found and if it is clear that the nuisance does not arise or continue by the act, default or sufferance of the owner or the occupier of the premises. In such a case the local authority may itself do forthwith what it considers necessary to abate the nuisance and prevent its recurrence.

In any other case, however, action can only be taken upon the authority of an order of the justices. That order is obtained in the following manner: If the person on whom the abatement notice was served has not complied with the requirements of the notice, or if the nuisance, although abated, is in the opinion of the local authority likely to recur, the appropriate official of the local authority can make a complaint to a justice and the justice shall thereupon issue a summons requiring the person on whom the abatement notice was served to appear before a court of summary jurisdiction.

An important and useful provision is contained in section 99 of the Act whereby any person aggrieved by the nuisance can make the complaint. If, therefore, the local authority is prepared to help an aggrieved party to the extent of serving an abatement notice—a notice which cannot be served by any person or body other than a local authority—but is not prepared to risk the expense of summary proceedings, the aggrieved party can take the matter into his own hands and can himself initiate the actual

court proceedings by making the necessary complaint to the justice. The Act, however, does not provide for the award of any costs to such a private complainant. The justices can order a defendant to pay the local authority's costs and expenses in connection with the making of the complaint and the proceedings before the court, but the private complainant must foot his own bill.

The points to be proved at the hearing are:—

The authority to prosecute of the officer of the local authority who made the complaint:

The service of the abatement notice and of the summons:

The existence of the nuisance at the time of the service of the notice, the service of the summons and the hearing (or, if it has been abated, that it is likely to recur):

The identity of the person served with the person responsible:

That the matters complained of do constitute a "statutory nuisance".

Upon such proof the justices may make a "nuisance order" requiring the defendant to abate the nuisance within a specified time and/or requiring him to execute works to prevent the recurrence of the nuisance. If neither the person responsible nor the owner nor the occupier can be found the nuisance order may be addressed to the local authority.

Failure to comply with a nuisance order can result in a fine not exceeding £5 plus 40s. for each day on which the offence continues after conviction (that is to say, after a further summons has been issued and the defendant has been convicted on that further summons for contravening the nuisance order), but of more practical importance is the provision that, if the nuisance order has not been complied with, the local authority may abate the nuisance and do whatever may be necessary in execution of the order. This provision does not apply to the private complainant; he must not endeavour to abate the nuisance himself. Nevertheless, if he has made the complaint and prosecuted the summons he can ask the justices to insert in the order a direction that the local authority shall abate the nuisance upon the defendant failing to do so. If he proposes to ask for such a direction—and it is certainly wise for him to do so—he should see that the summons is served on the local authority and that the local authority is represented at the hearing.

The procedure described above applies to any matter which is declared by any provision of the Act to be a statutory nuisance, but there are certain special provisions in the Act with regard to such nuisances as dust and effluvia from trades, businesses, etc.,

lack of ventilation in workshops and workplaces, smoke nuisances, coal mine refuse, etc. Similar procedure has been adopted in other statutes, either by declaring some act to be a statutory nuisance or by specifically adopting the procedure. There is, for example, the Barbed Wire Act, 1893, which relates to barbed wire on land adjoining a highway and constituting a nuisance to that highway.

How simple and inexpensive that procedure is when compared with an indictment for the misdemeanour of committing a public nuisance or with a High Court action for damages and an injunction! Perhaps, however, the conveyancing practitioner will be content to let his knowledge of statutory nuisances and their summary remedies grow rusty in the cupboard of self-assurance, convincing himself that all that sort of "stuff" is remote enough from his usual practice and that his property-owning clients do not often get themselves mixed up in such troubles and that if they do—well, sufficient unto the day . . .

If that view should prevail and consequently discourage any interest in the courts of summary jurisdiction, let us take a subject which affects every property owner, however law-abiding he may be, *viz.*: rates. Rates are, of course, recoverable by the local authority through the medium of a distress warrant issued by the justices. Briefly, the procedure is that the party in arrear is summoned to appear before the justices; at the hearing of the summons, the rating officer proves the rate by production of the rate-book, proves the service of the demand for the rate and the failure to pay, and finally proves the service of the summons and the usual notice under the Courts (Emergency Powers) Acts. Upon such proof the warrant must issue but its execution may be suspended if the defendant shows cause for such suspension under the Courts (Emergency Powers) Acts. If the execution of the distress warrant does not result in satisfaction of the arrears of rates, the justices may commit the defendant to prison, but they must not take this step without first inquiring into the defendant's means and satisfying themselves that the defendant's failure to discharge the rates was due to wilful refusal or culpable neglect.

It might be noted here that on the authority of the recent case of *Potts* v. *Hickman*, [1940] 4 All E. R. 491, goods seized under a distress warrant issued by the justices—and this applies to any such warrants, not only to those in respect of arrears of rates—are *custodia legis* and a landlord has no preferential claim for rent under the Landlord and Tenant Act, 1709, s. 1.

Still the conveyancing practitioner may say that this summary procedure is far removed from the usual problems of his practice, because *his* clients always pay their rates and do not fall into

arrears. But there are innumerable property owners who would like to question the correctness of the assessment upon their properties, and it is not often realised what extensive rating disputes can be settled before the justices. There is a large number of possible defences to an application by the local authority for a distress warrant and consequently there is a large number of rating problems which can be decided expeditiously before the justices instead of before the assessment committee. The practitioner can often do a better service to his client by advising a deliberate default in payment of the rates and the presentation of an adequate defence upon the consequent application to the justices than by pursuing the uphill task of an appeal to an infrequent sitting of the assessment committee.

It is true that the production of the rate-book is *prima facie* evidence of the correctness of the amount of the rate and the person rated. It may be added, too, that many persons, even, it is regrettable to say, some rating officers, have the idea that before the justices the rate-book is conclusive and that if any defendant wishes to dispute the amount of the rate or the fact of occupation or that he is not the person responsible he must do so before the assessment committee and not before the justices. But Shearman, J., in *Shillito* v. *Hinchliffe* (86 J. P. 110) made it clear that any objection based on the grounds that the rating authority has acted in excess of its jurisdiction is a good defence before the justices to an application for the issue of a distress warrant. He distinguished excess of jursidiction from cases in which the rating authority has acted erroneously in the exercise of its jurisdiction, *e.g.*, an assessment too high. The occupier's remedy in such a case is an appeal to the assessment committee for a reduction in the assessment.

Objections which can properly be taken before the justices include such important and vital matters as an objection that occupation was not beneficial (*London County Council* v. *Hackney Borough Council*, 92 J. P. 138). The question of occupation or non-occupation or non-beneficial occupation is always a question of fact for the justices and it can be appreciated, therefore, what a variety of difficult rating disputes can be decided by the justices, their jurisdiction arising merely out of an application by the local authority for a distress warrant, *e.g.*, cases about resident caretakers, vacant furnished houses, vacant grassland, seasonable business premises, summer residences, temporary huts, movable stalls, etc.

If the rate is good on the face of it, the justices must, of course, issue the distress warrant; but the contrary applies, namely, that if the rate is defective on the face of it the application for the

warrant should be dismissed—without costs, however, which is unfortunate for the defendant in a hard-fought case. Perhaps one of the most frequent causes of dispute which the justices are called upon to decide are those arising out of alterations in the rate-book of the name of the person rated, the person whose name is inserted objecting that he is not the proper person to be rated, or that he is not the rateable occupier although he is the visible occupier. Such matters as a difference between the rate-book and the valuation list, a question as to whether the property is within the rating authority's district, a failure to allow a person rated as owner his proper reductions, a failure to make a proper demand, a set-off of moneys in the hands of the rating authority—all give rise to disputes determinable by the justices and do in practice form the basis of defences to applications for distress warrants.

In addition to the enforcement of a levy of general rates on the property owner, the justices deal with the enforcement of another similar type of levy on the property owner, namely, road-charges. Cases arising out of the making-up and adoption of streets by a local authority and the consequent demand upon owners of property abutting upon the street for payment of a proportion of the cost occupy a large proportion of the time of the petty sessional courts. Under the Public Health Acts a local authority can give notice to owners or occupiers of premises fronting, adjoining or abutting on a street requiring sewering, levelling, paving, metalling, flagging, channelling, making good or lighting, to carry out such work; if the owners or occupiers do not carry out the work the authority may do so itself and recover the expenses from such owners or occupiers by complaint before the justices. Those expenses are recoverable from each frontager in such proportion as the local authority's surveyor may decide. If a party disputes the surveyor's apportionment he must make his objection within three months after notice and can then appeal to the Minister of Health; otherwise the surveyor's apportionment is conclusive and when the local authority proceeds to recover those expenses by summoning the frontager before the justices no objection can be entertained as to the amount claimed. But the surveyor's apportionment is only conclusive as to amount (*i.e.*, the amount of the expenses and the portion of that amount allocated to the defendant) and although the defendant cannot ask the justices to decide whether or not the work was necessary or proper or what the actual expenditure was or whether the apportionment was correct in principle, he can still raise the defence that the street was repairable by the inhabitants at large or that he is not a frontager.

Local authorities, however, usually take advantage of the procedure under the Private Street Works Act, 1892, rather than that under the Public Health Acts. The Private Street Works Act does not give the frontagers the option to carry out the work themselves. The Act allows the local authority to proceed with the work with no further preliminary than a notice to the frontagers that it proposes to do so. The procedure is as follows.

The council passes a resolution that a certain street be "made-up". The surveyor prepares a specification of the proposed works, an estimate of the probable expenses and a provisional apportionment. The council approves the specification, etc., and resolves that it be published. It is so published and notice of it is given to each frontager affected by it. Within one month from the date of the publication any owner of any premises shown in the provisional apportionment as liable to be charged with any part of the expenses of executing the works may serve a notice on the local authority objecting to the proposals on any one or more of the following grounds:—

That an alleged street is not a street within the meaning of the Act:

That the street is repairable by the inhabitants at large:

That there has been some material informality in or in respect of the resolution, specification, etc.:

That the proposed works are insufficient or unreasonable or the estimated expenses excessive:

That certain premises ought to be excluded from or inserted in the provisional apportionment:

That the provisional apportionment is incorrect in respect of some specified matter of fact:

That the provisional apportionment (if made on some other basis than *pro rata* on frontages) is incorrect in respect of the degree of benefit to be derived by any persons or the amount or value of any work already done by the owner or occupier of any premises.

If such a notice of objection be served, the local authority must apply to the justices to appoint a time to adjudicate upon the objection. Notice must be given to the objectors by the local authority stating the time and place appointed by the justices. At the hearing the burden of proof is on the local authority and the specification and provisional apportionment must be fully justified by evidence. The justices have power to quash in whole or in part or to amend the resolution, specification, estimate and provisional apportionment, to adjourn the hearing, to direct further notices to be given and to make an order as to the costs of the

proceedings. But the justices have no power to make an apportionment of the expenses of the works on any basis other than *pro rata* on frontages—although the council could do so by resolution.

It is a matter of "now or never" during the first month after the publication of the specification and provisional apportionment, because any of the objections which could be made then cannot "otherwise be made or allowed in any court proceeding or manner whatsoever".

The frontager still, however, has one more chance. When the works have been completed and the expenses ascertained the surveyor makes his final apportionment by dividing the actual expenses in the proportions in which the estimated expenses were divided in the provisional apportionment and notice of the final apportionment is given to the frontagers. Within one month of receiving that notice, a frontager can give written notice to the local authority of his objection to the final apportionment. The only grounds of objection that can be entertained at this stage are:—

(a) That the actual expenses have without sufficient reason exceeded the estimated expenses by more than 15 per cent.;

(b) That the final apportionment has not been made in accordance with the relevant provisions of the Act;

(c) That there has been an unreasonable departure from the specification, etc.

The procedure for hearing these objections to a final apportionment is exactly the same as that applicable to the objections to a provisional apportionment and, again, the objections cannot be made or entertained in any other manner. Therefore, the frontager who has not taken advantage of this procedure by way of notice of objection within the time limited finds himself without a defence when the local authority eventually proceeds by way of summons before the justices for recovery of the amount set against his name in the final apportionment.

Usually the local authority is on the offensive in cases relating to streets and highways and the individual property owner is on the defensive. The rôles may, however, be changed. It should not be forgotten that the powers of the justices under the Highway Act, 1835, to order repairs to be done to a highway still remain and can often be used to good advantage. If any highway is out of repair or "is not well and sufficiently repaired and amended" and information on oath of one witness is given to a justice, such justice must summon the "person or body politic or corporate chargeable with such repairs" to appear before the justices at

special or petty sessions. The justices then appoint a competent person to view the highway and report to them thereon on a specified day and place or alternatively two of the justices carry out the inspection themselves. If the justices are satisfied that the highway is not in a state of thorough and effectual repair they may (in addition to imposing a penalty) make an order on the party liable to do the repairs appointing a time within which the repairs must be done. If the repairs ordered are not effectually made within the time limited, the justices may order some other person to carry out the repairs, at the same time ordering the defaulting party to pay the cost of the repairs. The justices may include in any order which they make an order as to the costs of the proceedings.

It is unnecessary to comment further upon the usefulness of these provisions to an owner whose property abuts upon a main road, except to say that the disputes to which the provisions usually give rise turn upon the question of whether or not the road is a highway repairable by the inhabitants at large, *i.e.*, by the local authority without resort to the frontagers.

There are, of course, many other matters relating to streets and highways in general which are dealt with by the justices and which intimately concern the property owner, *e.g.*, unfenced pits, steam-engines, windmills, brick kilns, etc., near the highway (Highway Act, 1835); unenclosed quarries near the highway (Public Health Act, 1875—dealt with as a statutory nuisance); trees, etc., obstructing the highway (Highway Act, 1835); encroachment on the "carriageway or cartway" by making any building, hedge, ditch or other fence thereon (or on the side thereof) within fifteen feet of the centre thereof (Highway Acts, 1835 and 1864).

Permission to divert or stop up a highway is not a matter for a petty sessional court; that is a matter for quarter sessions. But if the highway is diverted or stopped up or there are encroachments upon it without the appropriate permission having been granted, then the petty sessions may have to exercise their jurisdiction. Even then, however, that jurisdiction is very often ousted by a claim of right, *e.g.*, the frontager claims title to a portion of land which apparently forms part of the highway and around which he has, in pursuance of his alleged right, erected a fence. The justices cannot adjudicate upon matters of title and the utility and convenience of summary proceedings are abruptly terminated by a *bona fide* claim of right or title.

The boundary of the justices' jurisdiction in this respect has been marked by the many cases upon wilful and malicious damage

to property and in particular by those cases in which alleged rights of way have been blocked by fences, posts, etc., and the obstruction has been later forcibly removed. Section 14 (1) of the Criminal Justice Act, 1914, provides for summary conviction of any person who wilfully or maliciously commits any damage to any real or personal property if the damage does not exceed £20, but this provision does not apply " where the alleged offender acted under a fair and reasonable supposition that he had a right to do the act complained of ".

No useful purpose would be served by entering into a discussion here of the many cases dealing with the ouster of the justices' jurisdiction by a claim of right because those cases are reviewed in the treatise entitled " Claim of Right before Justices " in 56 J. P. 211. Suffice it to say that it is for the justices to decide whether the defendant acted under a fair claim of right and whether it is such a right as can exist in law. A mere pretence of title or assertion of right is not sufficient to oust the justices' jurisdiction; the claim must be made *bona fide*.

However, despite the ouster of the jurisdiction of the justices in such cases there are still many instances of the solution of the property owner's problems in the petty sessional court. This is especially so if the property owner happens to be the owner of property of a specialised nature, such as factory premises, shop premises, licensed premises, etc.

Those are matters too extensive to embark upon here. It is surely sufficient to take merely those instances which have already been given—all of which are instances of cases of common occurrence in the petty sessional courts and most of which may involve any class of property owner—in order to impress upon the conveyancing practitioner the benefit to be derived from a judicious use of the summary jurisdiction of the justices.

" HOTCHPOT " AT COMMON LAW, BY CUSTOM AND STATUTE, IN EQUITY AND THE PRACTICE OF CONVEYANCERS.

By Bertram B. Benas, B.A., LL.B., Barrister-at-Law.

The literature relating to hotchpot is not extensive, scantier in the text-books than one might have expected, while the Reports dealing with or touching upon the subject are not numerous. It is proposed in the present survey to consider Hotchpot as envisaged at common law, by custom and statute, in equity and the practice

of conveyancers. In these days of Year Book revelations it is unsafe to speak with certitude as to the earliest date of the appearance of a term of the law or of that which the term signifies, apart from any statutory mention in that behalf. For our present purposes, however, we may accept Blackstone's compendious statement taking us back to Bracton, Britton and Littleton, supplemented by Coke upon Littleton with the classic notes of Francis Hargrave and Charles Butler relating thereto. Blackstone introduces the subject when treating of coparcenary. He observes (2 Bl. Comm. 190): "There is yet another consideration attending the estate of coparcenary: that if one of the daughters has had an estate given with her in frankmarriage by her ancestor (which we may remember was a species of estates-tail, freely given by a relation for advancement of his kinswoman in marriage) in this case, if lands descend from the same ancestor to her and her sisters in fee simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending (citing Bracton l. 2. c. 34. Litt. § 266 to 273)". Noting that this mode of division was known in the law of the Lombards, he continues: "with us it is denominated bringing those lands into hotchpot (citing Britton c. 72) which term I shall explain in the very words of Littleton (§ 267): 'it seemeth that this word hotchpot is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together'. By this housewifely metaphor our ancestors meant to inform us (Litt. § 268), that the lands, with those given in frankmarriage and those descending in fee simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage: and if she did not choose to put her lands into hotchpot, she was presumed to be sufficiently provided for, and the rest of her inheritance was divided among the sisters. The law of hotchpot took place then only, when the other lands descending from the ancestor were fee simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into hotchpot (Litt. § 274). And the reason is because lands descending in fee simple are distributed by the policy of the law for the maintenance of all the daughters; and if one has sufficient provision out of the same inheritance equal to the rest, it is not reasonable that she should have more; but the lands, descending in tail, are not distributed by the operation of law, but by the designation of the giver, *per formam doni*; it matters not therefore how unequal this distribution may be. Also no lands, but such as are given

in frankmarriage, shall be brought in hotchpot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage portion (Litt. § 292)". Here follows a statement of much historic interest and value, as testifying to the place occupied by hotchpot in the Law of Property in Blackstone's time—"And therefore, as gifts in frankmarriage are fallen into disuse, I should hardly have mentioned the law of hotchpot, had not this method of division been revised and copied by the Statute of Distribution of personal estates" . . . " (2 Bl. Comm. 516, 517) where directions are given that no child of the intestate (except his heir-at-law) on whom he settled in his lifetime any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This first and equitable provision hath been . . . said to be derived from the *Collatio bonorum* of the imperial law which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the antient custom of London, of the province of York, and of our Sister Kingdom of Scotland: and with regard to lands descending in coparcenary, that it always hath been, and still is the common law of England, under the name of hotchpot." (As to the Roman law, see Dig. 36.6.1. and 5.2.25, pr. Codex 6. 20. As to the English Customary law, see *Kemps* v. *Kelsey*, Prec. Ch. 596; *Wilkinson* v. *Atkinson*, 1 Turn. & R. 257; and *Toller on Executors*, p. 398; and as to the Scots law, Ersk. Inst. b. 3. tr. 9. ss. 24.) The statute took nothing away given to any of the children, however unequal that may have been. However much it exceeded the remainder of the personal estate left by the intestate the child might keep it all, but if the child were not content and will have more, then he has to bring into hotchpot what he had received: this is the substance of the *dictum* of Lord Raymond in *Edwards* v. *Freeman*, 2 P. Wms. 443, wherein he observed that that manifestly seems to be the intention of the Act, grounded upon the most just rule of Equity, equality.

From the passages from Blackstone above quoted, it is clear that at the period at which he wrote his Commentaries, hotchpot was part of the Law of Property, but not as yet of the Practice of Conveyancing. It was living law as regards statutory distribution upon intestacy, but obsolete law as regards frankmarriage. Blackstone regarded the derivation of the statutory form of hotchpot from the hitherto prevailing law in respect of frankmarriage and

coparcenary, and in *Vaizey on Settlements*, the learned conveyancer pointed to the similarity in principle of the "hotchpot clause" in present conveyancing practice "inserted as a matter of course in all properly drawn settlements. It was", he observes, "probably suggested by the hotchpot provision in the Statute of Distributions (citing 9 Jarm. By. 156); and precludes those objects of the trust in default of appointment who have benefited by appointments from participating in the unappointed part of the property without bringing the part the benefit of which they have obtained into hotchpot, or in other words without treating that part as added to the fund to be divided before the equal division is made" (p. 1221).

Reference may be made to Co. Litt. 176b–180a, *passim*, together with the notes hereon in the 19th edition of *Hargrave & Butler*, especially with regard to frankmarriage and coparcenary. Of Coke's own words the following are apposite for our present purpose: "Hutspot is an old Saxon word, and signifieth so much as Littleton here speaks. And the French use hotchpot for a commixion of divers things together. It signifieth here metaphorically *in partem positio*. In English we used to say hodgepodge, in Latine farrago or miscellaneum." As regards the form of the word hodgepodge, it is noteworthy that in the collection entitled "Original Precedents of Settlements drawn by the most distinguished conveyancers of the present day and now first published under the direction and inspection of James Barry Bird, Esq.," (1800) at p. 90, there is a "hotchpot" clause, the words used being, "without first bringing and applying such appointed share into hotchpotch" and the shoulder note to the clause is "hotchpotch". Similarly at p. 128, the shoulder note to the "hotchpot" clause is "hotchpotch", the actual clause itself containing directions for effectuating the objective of such a clause without in fact using the words either "hotchpotch" or "hotchpot". The index refers to "Hotchpotch" with the cross-reference "see Provisions" under which heading there is the following entry, "For bring shares into hotchpotch 90, 128" (*a*).

The hotchpot rule in cases of frankmarriage and coparcenary having become anciently obsolete with the falling into desuetude of frankmarriage (*b*), and reference having been made to Co. Litt. for

(*a*) The term "hotchpotch" in relation to a settlement endured in lay parlance long after it had ceased to obtain among lawyers. The present writer recalls a member of his own family, born in the early Victorian era, referring to the "hotchpotch" clause in one of the family settlements.

(*b*) As to Frankmarriage, see Joshua Williams, Seisin of the Freehold, pp. 151—153, Challis, Real Property (2nd ed.), pp. 12—13, 265, and 343, and observations upon Co Litt. thereon in Strahan's Introduction to Conveyancing (1st ed.), p. 182.

the details, it must suffice here to set forth the law as to hotchpot in respect of descent and distribution in force until the enactment of the New Property Legislation, 1925. It is conveniently summarised in *Jenks' Modern Land Law* (p. 211) thus: "Any child of the deceased, other than his heir at law, who has received an advancement from the deceased during his lifetime must, if he claims a share of the estate to be distributed, bring this advancement into account, so that the share of all the children may be equal." This is the effect of the Statute of Distribution, 1670, in relation thereto. The late learned author observes that the rule had given rise to certain difficulties with regard to which the following points have been decided:—

(1) The provision bound representatives of deceased children (*Proud* v. *Turner*, 2 P. Wms. 560).

(2) It did not operate to enlarge the share of the widow (*Kirkcudbright* v. *Kirkcudbright*, 8 Ves. Jun. 51).

(3) It only applied to advancements by a father (*Holt* v. *Frederick*, 2 P. Wms. 356).

(4) The exemption of the heir-at-law from the necessity of bringing an advancement into hotchpot extended only to an advancement of land: in respect of personalty, he stood on the same footing as other children (*Kirkcudbright* v. *Kirkcudbright*, *supra*).

The following further points shall be noted:—As to whether the hotchpot provision applied only to a complete intestacy or also to a partial intestacy, see *Twisden* v. *Twisden*, 9 Ves. 413; *Walton* v. *Walton*, 14 Ves. 324; *Edwards* v. *Freeman*, 2 P. Wms. 435, 440 and 446; *Stewart* v. *Stewart*, 15 Ch. D. 539; *Re Ford*, [1902] 1 Ch. 218; 2 Ch. 605; *Re Roby*, [1908] 1 Ch. 71. The advancement and hotchpot provisions under the statute did not apply to brothers and sisters, nor to more remote next-of-kin (*Re Gist*, [1906] 2 Ch. 280). The advances were chargeable with interest, and as to the rate thereon see *Stewart* v. *Stewart*, *supra*, and *Re Whiteford*, [1903] 1 Ch. 889; *Re Davy*, [1908] 1 Ch. 61; *Re Poyser*, [1908] 1 Ch. 828. As to what amounted to an advancement to attract the hotchpot provision of the statute, see *Edwards* v. *Freeman*, *supra*; *Re Taylor*, 20 Eq. 155; *Hatfield* v. *Minet*, 8 Ch. D. 136; *Re Blockley*, 29 Ch. D. 250; *Holt* v. *Frederick*, *supra*. The *customary* modes of administration of England and Wales were saved by the Statute of Distribution, 1670, but by the amending Act of 1685 the saving only was made applicable to the mode of distribution, not to the rights of the administrator and did not affect the paramount right of testamentary disposition. The Act of 1856 (19 & 20 Vict. c. 94), however, abolished all modes

of customary administration, using the latter term in its widest sense to include distribution.

The present method of distribution in respect of hotchpot operates under the Administration of Estates Act, 1925, s. 47 (1) (iii), in cases of total intestacy; section 49 (a), in cases of partial intestacy. The former, shortly stated, enacts that any money or property paid or settled or covenanted to be settled by the intestate on a *child* of the intestate either by way of advancement or on the *child's* marriage has to be taken into account at a valuation, the value to be reckoned as at the death of the intestate, in or towards satisfaction of the share of such child or the share the child would have taken if living at the death of the intestate, subject to any contrary intention expressed or appearing from the circumstances of the case. The latter cited section enacts, in effect, that in the case of partial intestacy the "hotchpot" provisions above quoted shall apply to any beneficial interests acquired by any *issue* of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons. These hotchpot provisions apply on the death of a mother as well as of a father, but in the case of total intestacy only in respect of a *child*, while in the case of partial intestacy, the provision is not restricted to children but extended to the wider sphere of issue. The differences between the pre-1926 statutory hotchpot and that introduced by the New Property Legislation of 1925 will be evident at once. Apart from the statutory changes in the sections cited, the abolition of descent in general to the heir and the assimilation of real and personal property which are marked characteristics of this legislation fundamentally affect the course of the operation of hotchpot in intestacy cases.

We have thus seen how hotchpot emerges from the old customary law (as to this see *Holdsworth, History of English Law*, Vol. III, p. 562, and *Holt* v. *Frederick*, cited therein, *supra*, *per* King, L.C., at p. 358 of the report) and finds its way into statutes ranging from 1670 to 1925. These instances of the operation of hotchpot relate not to the direct acts of party in that behalf, although resultant indirectly from prior acts productive of circumstances evoking a hotchpot effect. The legal pedigree of hotchpot brings us to the process called forth by the direct act of party. In 3 Davidson Prec. Conv. (2nd ed.) C. Davidson and J. Waley, pp. 124–6, it is observed: "An object of a power to whom a share is appointed is not excluded from taking another share of the unappointed funds. . . . As this principle as to the distribution of the unappointed residue of a fund subject to a power of appointment with a trust for equal division in default of appoint-

ment usually defeats the intention . . . a clause called a hotchpot clause is inserted in settlements containing power of appointment in favour of children, which modifies the trust for equal division, by providing that no child to whom a share is appointed, shall in default of appointment to the contrary (citing *Wellesley* v. *Lord Mornington*, 1 Jur. (N.S.) 1202) take any share of the unappointed part without bringing the appointed share into hotchpot, that is, until each of the other children shall have received a share equal to that appointed to him or her." It is possible to produce a synthetic or "constructive" hotchpot without an express hotchpot clause. It is observed in *Vaizey on Settlements* (p. 1221) that "moreover, as Mr. Chance pointed out, an appointment can be made conditionally, so as to give it the effect of the common hotchpot clause (citing *Chance on Powers*, s. 3076, and 3 Davidson, *supra*, 3rd ed., 168). Ordinarily, however, the participation by appointees in an unappointed part of the fund is guarded against by the insertion in the settlement of what is called a 'hotchpot clause'." The hotchpot clause finds its way into Wills, for the principle which lies at the root of hotchpot is logically as applicable to testamentary settlements as to those *inter vivos* (see hereon 4 Davidson, *supra*, 2nd ed., p. 41, citing for the working of a hotchpot clause, *Maclaren* v. *Stainton*, 7 Jur. (N.S.) 691, and where life interests only have been appointed, *Rucker* v. *Scholefield*, 11 W. R. 137. For a classification of hotchpot clause see *Re Kelsey*, *Wooley* v. *Kelsey*, [1905] 2 Ch. 465). Joshua Williams laid it down (in 1879) that the hotchpot clause in a personalty settlement "should never be omitted; for without it, any child to whom an appointment of a share may have been made, is entitled equally with the others, to whom no appointment may have been made, to a share of what remains unappointed" (*Williams on Settlements*, p. 164). As to Real Settlements he observes: "A clause of hotchpot which is appropriate and easily worked where the settlement is of money or stock is not so appropriate in a settlement of land not directed to be sold and should be omitted" (*ibid.*, p. 206). That this latter view of the eminent conveyancer was not universally shared can be seen by references to the Precedent in 4 Davidson, *supra*, 2nd ed., p. 870, where there is an express hotchpot clause in a real settlement. In *Banning on Marriage Settlements* (1884) the author observes: "The usual 'hotchpot' clause is also still required to be inserted when (as is almost universally the case) its object is desired, though it might have seemed that the Legislature might as well (while about it) have gone on to enact that its effect should be deemed to be read into every settlement in the absence of expression to the contrary"

(p. 153), noting in a footnote that under the Statute of Distribution children on an intestacy have to bring advancement into hotchpot; and the same is the case under the customs of London and York, as previously stated. A form of implied hotchpot arises from "a statement in the appointment of a share to one that the appointor desired an equal division (*Fortescue* v. *Gregor*, 5 Ves. 553); or that the appointment was intended to be made in lieu of all claims and demands of the appointee to any original or principal share (*Foster* v. *Cautley*, 6 De G. M. & G. 55)" (Vaizey, *supra*, p. 1221). The gradual growth of the prevalence of a hotchpot clause is evidenced by an Irish case, *Lees* v. *Lees*, Ir. R. 5 Eq. 549, which decided that a hotchpot clause will not be inserted in a settlement made in execution of articles not referring to such a clause. The Vice-Chancellor held the view that although such a clause had become usual in well-drawn instruments it was not so usual at the date (1811) of the instrument then before the Court. The question thus arises, at what date did hotchpot by act of party originate? Sir William Holdsworth tells us in his *History of English Law* that "it is clear from Bridgman's precedent that the scheme of the modern strict settlement had been in substance reached by the seventeenth century" (Vol. VII, p. 376). "It is in fact his creation of the modern strict settlement which constitutes his chief claim to be called the father of modern conveyancing" (*ibid.*, p. 377). "A reference to the settlement from Bridgman's precedents set out in Appendix III . . . will illustrate the fact that Bridgman has in all essentials created the modern form of strict settlement" (*ibid.*, p. 380). At p. 554, at the point where in the settlement the shoulder note is as follows: "Provision in case daughters married in the father's lifetime", an accounting effect is envisaged in the spirit of hotchpot, the clause running thus: "Shall be reckoned and accompted as part of the Portion or Portions hereby allotted". As Mr. J. M. Lightwood observed in his learned article on "Trusts for Sale" (3 Cambridge Law Journal, at p. 61), the seventeenth century conveyancing works and sets of precedents (listed in Holdsworth, *op. cit.*, VI, at p. 688) are not so readily accessible. When we come to the eighteenth century and the earlier period of the nineteenth century, the present writer has been enabled to refer to some in his own collection at hand which throw light on the emergence of the clause into common form. In *Newnam's Complete Conveyancer* (often misprinted in quotation as "*Newman*"—published in the seventeen-eighties—there is some doubt about the exact year in those 'eighties—internal evidence points to the likelihood of each volume being published in a separate year; see hereon, generally, *Sweet & Maxwell's Legal Bibliography*,

Vol. II, p. 154 (1931)) there are numerous settlements, marriage articles, marriage settlements, and post-nuptial settlements. The "hotchpot" clause in name does not appear, although in a few instances a clause producing an accounting effect is included. In the historical introduction to the later *Martin's Practice of Conveyancing*, restated substantially in its successor, *Davidson's Precedents*, Newnam's work is not highly praised, but it has the advantage of giving, in many instances, as Mr. Lightwood noted in the article above mentioned (*ibid.*, at p. 62), "the names of the counsel who drew or settled them". For instance, in the Marriage Settlement, p. 284, at the top of p. 285, there is a clause effecting the object of hotchpot, the shoulder note to which is, "if father prefers any of them, same to be accounted in full or part etc." There is no signature to this settlement identifying the draftsman, and it may well have been Newnam himself. In another unsigned marriage settlement, p. 380, at p. 383, the shoulder note states "other advancements by husband to be accounted as portion or part" and at p. 385, "Advancement by their father or by the other terms to be accounted etc. unless he declare the contrary". In one marriage settlement by Gilbert Horsman, for instance, p. 372, at p. 375, provision is made for accounting as thus stated in the shoulder note: "No Sale etc. until portion payable . . . if portions etc. raised or secured or daughter preferred term to cease", the accounting being effectuated by apt wording in that behalf. In a post-nuptial settlement by the same conveyancer, p. 408, at p. 415, the shoulder note states "if father prefer any of his younger children in his lifetime, same to go towards satisfaction of their portions". Several of the settlements contain clauses providing that beneficiaries shall not receive "double portions". Such a proviso is contained in marriage articles by James Booth (p. 241, at p. 244) and an accounting effect is provided for in a set of marriage articles (p. 258, at p. 261) by Nathaniel Pigot (*c*).

At p. 587 in the precedents of provisos there appears one headed thus: "That if the Husband and Wife shall give any sum of money to one of their children for preferment in Marriage, or if Lands shall descend to such children; then such sums and Lands shall be deemed as part of their portions etc." At p. 783 in the

(*c*) As to James Booth and Nathaniel Pigot, the former is styled by Charles Butler the patriarch of the modern school of conveyancing—Butler's Reminiscences, ii, p. 274—and the latter is referred to in Martin's "Practice of Conveyancing" by Charles Davidson, Vol. II, p. 32, as justly distinguished not only as a profound lawyer, but as a draftsman of the most consummate skill. See the articles by the present writer on "Charles Butler", The Conveyancer (old series), Vol. XVII. p. 141, and "The Succession in conveyancing tradition", *ibid.*, Vol. XVIII, p. 73.

precedents of provisos in Wills there is a proviso set out headed "that Sums advanced by Testator in his lifetime shall be taken as part of Portion". It is a very full form and signed by Newnam himself. By the year 1800, Bird's collections of Original Precedents of Settlements (by contemporary conveyancing counsel) provides two settlements with "hotchpotch" clauses as previously mentioned. James Barry Bird, the editor of the above work, seems to have been a most voluminous legal anthologist, judging by the entries against his name in the Bibliographies of the Law. In the second edition of *Bythewood's System of Conveyancing*, by Jarman (1829), it is interesting to refer to a precedent of an appointment by a father of a portion for his daughter (Vol. II, p. 537) wherein at p. 542 the shoulder note runs "save only that appointee shall not in any event, unless by appointment, take more than with the sum appointed she would have been entitled to if no appointment had been made". When the subsequent edition of Volume II was published, third edition, *Bythewood & Jarman, System of Conveyancing* (1841), the same precedent at the same point has as its shoulder "Hotchpot clause", while the actual wording of the clause is identical with that of the earlier edition, showing that "Hotchpot" had become a technical term of conveyancing and not merely a term of customary or statutory law, although the draftsman did not use the word itself in the drafting of the clause. The earliest edition of *Hayes & Jarman's Forms of Wills* (1835) is not to hand at the time of writing. But in view of its joint authorship, one may perhaps assume that treatment of hotchpot was in line with "Bythewood" by Jarman, and later with "Bythewood & Jarman". The earliest edition now in the possession of the present writer, the sixth edition, by T. S. Badger Eastwood (1863), contains modern forms of hotchpot clauses.

By the time the nineteenth century had got into stride, the hotchpot clause had become progressively common form and was styled as such by inclusion in the collection of common forms in *Martin's Practice of Conveyancing* (1844). Short forms are given on pp. 283, 298, 336 and 682, and a fuller form on pp. 680–682. The short forms use the term hotchpot alone, the fuller form adds an explanatory description thus, "into hotchpot and distribution with the other child or children of the said intended marriage". A footnote at p. 283 harks back to "hotchpot in cases of customary division", referring to Hargrave's notes to Co. Litt. 176b. From this page Martin's work looks to the past of hotchpot; while the shorter forms in Martin read as if they were drafted to-day. From them we can trace the pedigree to date, for Martin begot Davidson,

both the "great" and "little" works bearing that name, and Davidson begot Key & Elphinstone. When *Prideaux's Precedents in Conveyancing* first came into use (1852), hotchpot had already established itself in Conveyancing technique. No reference is made to other early nineteenth century collections of precedents as, in general, they have ceased to be re-edited to date. Mention, however, must be made of *Vaizey's Collections of Precedents and Forms* (1888), devoted as they are exclusively to Settlements and forming a supplementary volume to the learned conveyancer's treatise on the subject. In a covenant on marriage by Husband's Father to leave Husband a share of covenantor's estate equal to that of any other child there is a proviso, the shoulder note (p. 183) being thus: "Advances to other children to be brought into hotchpot" (and the term is expressly used in the draft). There are exceptions provided for, and to these there is added this footnote: "This agrees with the rule with respect to advancements under the hotchpot clause in the Statute of Distributions . . ." Thus 218 years after the statute had been enacted its conveyancing progeny recalled the legislative ancestry. There remains for consideration some case law relating to hotchpot, including that by product of Equity in the way of the claim of contribution as between co-sureties.

(*To be continued.*)

A "LIFE IN BEING" FOR THE PURPOSES OF THE RULE AGAINST PERPETUITIES.

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Every future contingent interest in property must nowadays, by virtue of the rule against remoteness of vesting, commonly called the Rule against Perpetuities, be so limited as to vest in the grantee not later than twenty-one years after the expiration of a "life in being". The problem of the "life in being" bears a double aspect: in the first place it must be ascertained what are the essential characteristics of the "life", and in the second how it may be introduced into the framework of the limitations in the settlement. The second is the more difficult aspect, from the point of view of

a confident statement of law, but, before describing the methods by which the "life" may be so incorporated in an instrument, it may be useful to define the "life" so as to indicate what "lives" can be utilised for the purpose.

The importance of the "life in being" scarcely requires emphasis; the judicious selection of such "lives", with the further liberty to select a number of concurrent "lives" and so obtain the benefit of the longest survivor, may enable vesting to be postponed for an extremely long period. If no "life in being" is used, the postponement is cut down to a bare twenty-one years. An example of the working of this rule is the case of *Palmer* v. *Holford* in 1828 (4 Russ. 403), where a grant whose vesting was deferred for a period of only twenty-eight years was held ineffective. Had a "life in being" been incorporated a much later vesting could validly have been provided for. The recent case of *Re Vaux*, [1939] Ch. 465, displays both the inherent dangers and inherent possibilities of limitations referring by implication to "lives in being". It is thought that the full potentialities of the "life in being" are not realised, and, in particular, that an unduly narrow view of the means by which it may validly be incorporated in the limitation leads in practice to a stultification of its great utility.

Essentials of the "life in being".

The essential characteristics of a valid "life in being" may be said to be now fairly well settled. It may be compendiously defined as the life of a human being born or conceived at the date when the instrument creating the future contingent interest comes into operation, the fact of such existence at that date as well as the moment of expiration of the life being both ascertainable. That the life could ever be other than that of a human being may seem out of question. Some difficulty has been caused by the decision in *Re Dean* (1889), 41 Ch. D. 552. In that case North, J., upheld a bequest for the upkeep of the testator's horses and dogs so long as they should survive. It is difficult to quarrel with this decision, but in so far as it suggests that the life of an animal can be a "life in being" it is now discredited. The fact that the horses and dogs would not live for more than twenty-one years probably weighed with North, J., but the suggestion that a Court will take notice of animal expectation of life was strongly controverted by Meredith, J., in *Re Kelly*, [1932] I. R. 255. After referring to the tortoise and the whale, the learned Judge opined that an animal can never be a "life in being" and that the expiration of the life of the short-lived butterfly, even, would be too remote a contingency. It is suggested that this view is generally shared by the profession.

Re Dean is not quite in point so far as remoteness of vesting is concerned and probably will not be followed in that connection.

A life in being must be born or conceived at the relevant date. That a child *en ventre sa mère* is "*in esse*" for this purpose has been settled since 1797 (*Long* v. *Blackall*, 7 Term Rep. 100). In that case the Court upheld a gift to the male issue of a child with which the testator's wife was then *enceinte*, after a life interest to that child. The law usually recognises such persons as in existence and there could hardly be any reason for making perpetuities an exception, in view of the relatively short duration of actual gestation, to which this extension is limited (*per* Macdonald, B., in *Thellusson* v. *Woodford* (1805), 11 Ves. 135). This rule has been more recently upheld in *Re Wilmer's Trusts*, *Moore* v. *Wingfield*, [1903] 1 Ch. 874. The effect is, that a period for gestation is allowed before the birth of the life in being as well as at the expiration of the perpetuity period. The choice of an individual neither born nor ascertained may seem a remote eventuality, but an example which must not be uncommon in dispositions can readily be suggested. Suppose a provision for the division of funds among all the children of all the grantor's brothers and sisters. If the grantor's parents are still alive the law will recognise a possibility of the birth of further children to them; the brothers and sisters as a complete class are not, therefore, *in esse*, and the gift to their children will fail. This rule avoided a power of appointment in the case of *Ward* v. *Van der Loeff*, [1924] A. C. 653. A gift to nephews and nieces as a class cannot, therefore, always be made with safety.

The "life" must be in existence when the instrument comes into operation. In the case of a deed the relevant date is that on which the deed is executed. Children born to the grantor or grantees thereafter are not themselves "lives in being", a material fact in gifts to grandchildren. It is not clear whether it need appear from the deed itself that the children are in being, provided that is in fact the case; for example, a gift in a deed to the children of the grantor's sons might be valid in favour of the children of such sons as were actually born before the deed was executed. In *Herbert* v. *Webster* (1880), 15 Ch. D. 610, a restraint on anticipation was sought to be imposed by deed on the settlor's daughters generally. He had, in fact, two daughters then living, and, though this fact did not emerge from an examination of the deed itself, the Court held the restraint had validly attached to the interests of these two. A restraint on anticipation could not be attached to the interest of an unborn person as it would restrain disposition of the property till beyond the perpetuity period (*Fry* v. *Capper*

(1853), Kay 163). More important is the application of the rule to wills. Here the relevant date is the death of the testator and not only need the fact of the existence of the lives chosen not appear on the face of the will, but such lives can also come into existence between the date of the execution of the will and the death of the testator. Thus, a gift to each child of each of the testator's nephews will be good in favour of the children of nephews actually born at the time of the testator's death (*Storrs* v. *Benbow* (1853), 2 Myl. & K. 46). A similar case is that of *Cattlin* v. *Browne* (1853), 11 Hare 373. There the devise was to X for life, with remainder to every child of X for life, remainder to the children of such child. When the testator died X had two sons, A and B, and the gift to them and the remainder to their children was held to be good. In *Wilson* v. *Wilson* (1859), 28 L. J. Ch. 95, there was a direct gift to each of the children of I. L., for life, with remainder, as respects each share, to the children of such child. This disposition was upheld as to the children of M. L., who was a daughter of I. L. alive at the time of the testator's death.

The choice of a life may fail, not only because the life chosen is not yet in existence, but also because it cannot be proved to be in existence. It is a general principle of law that what is not provable cannot, for legal purposes, exist. So far as the perpetuity rule is concerned something more may yet not suffice. It seems that the lives chosen must be such as are practicably ascertainable. An ambitious testator, in *Re Moore*, [1901] 1 Ch. 936, sought to utilise as "lives in being" all persons alive at his death. The identification of these lives was obviously impracticable and the gift failed for uncertainty. How small must a class be before this rule will be satisfied? Examples suggested in various cases include the Members of the House of Commons, the graduates of the Universities of Oxford or Cambridge. The employees of a business, the residents in a street might also be taken. The case of *Re Villar*, [1929] 1 Ch. 243, is useful in this connection, since the class chosen, the living descendants of Queen Victoria, numbered over a hundred persons, and yet the "lives" were held sufficiently defined. The exalted character of the "lives" taken may have contributed to the holding that their identity was discoverable, and this consideration was no doubt present in the minds of those who drafted the limitation. There was a peculiar difficulty in *Re Villar* (*supra*) which suggests that the limitation actually chosen was not the best which could have been devised. Among the descendants of the Queen were certain members of the Russian royal house. The identities of these Romanoffs were well known; what was less clear was the question of their having survived until the date of

the testator's death. If they had died or been put to death in the Russian Revolution they were not members of the class chosen by the testator, the descendants of Queen Victoria alive at his, the testator's, death. On the other hand they might still be alive in some remote district and might, in the event, outlive their more conspicuous kin beyond the Russian border. The Court of Appeal was not satisfied that it was impracticable to ascertain the identity of the members of the class taken.

If a class of British residents is taken the system of registration of death should normally prevent this problem arising, but the possibilities of emigration and of the war "missing" cannot be entirely dismissed. An interesting case on this same point of uncertainty is *Re Viscount Exmouth* (1883), 23 Ch. D. 158, in which the testator took as "lives" all persons alive at his death who should subsequently attain the title. Although the difficulties were not so obvious as those in *Re Moore* (*supra*) they were no less real. It was impossible to say who were the lives in being at any particular time. Fry, J., pointed out that it would be impossible to say whether any particular person would attain the title, or, if he did so, whether no other person of the wide class chosen would later succeed to it. Suppose a certain X succeeds to the title, a person alive when the testator died. The devise or bequest cannot be distributed on or within twenty-one years after his death, for another person, Y, also then alive, may later succeed to it. On the other hand, if the distribution is postponed until no person alive at the testator's death could possibly take, it will then be apparent that X was the only "life in being" and that the distribution should have, but has not, taken place within twenty-one years after his death.

A grantor or testator may also leave it wholly uncertain which of several possible "lives" he has in mind. This is also obviously relevant to the question of the incorporation of the life in the settlement but may perhaps most appropriately be brought under the head of "uncertainty". The situation occurs where a general saving clause is used. In *Pownall* v. *Graham* (1863), 33 Beav. 242, a testator left personal estate to his brothers for life and, after their decease, to be distributed regularly among their children "as the law in such cases admits". This proviso suggested that he had the perpetuity rule in mind and that he was thinking of periodical payments after the death of all his brothers. The Court felt that it could fairly hold the last surviving brother to be the "life in being" and gave effect to the testator's wishes for a period of twenty-one years from that brother's death.

In *Re Vaux*, [1939] Ch. 465, the testator, after giving a life

interest to his wife and certain pecuniary legacies, directed his trustees to apply the capital and income of his residuary fund for the benefit of his children and grandchildren in the way they thought most expedient, subject to a provision that all dealings "shall be within the limitations prescribed by law". Simonds, J., without actually deciding the point, expressed the opinion that the proviso was meaningless, but the Court of Appeal upheld the limitation and decided that it was not void for remoteness. Clauson, L.J. (delivering the opinion of the Court) said (at p. 475): "It was suggested that the saving words were ineffective because they were too vague and uncertain. The limits of the rule cannot, so the argument ran, be regarded as something '*in vacuo*'. They must be construed by reference to some defined lives; otherwise the limits of the rule are uncertain. Reference was made to *Re Moore*, [1901] 1 Ch. 936, where Joyce, J., held that a gift to continue until the 'period of twenty-one years from the death of the last survivor of all persons who shall be living at my death' was void for uncertainty. The question whether the gift was void as a perpetuity was left undecided. It is no doubt necessary to consider whether the saving words, restricting as they do, in our judgment, the period during which the power created by clause 12 [of the will] is exercisable, may not be inoperative as imposing an uncertain and for that reason void restriction. In our judgment the saving words relate to the nature of the interest to be created and have the effect of restricting the period for the exercise of the power by reference to the nature of the interest which it is permissible to appoint." In this case, therefore, the lives could be determined by reference to the persons taking an interest, but it is clear that the principle is of much wider application, and lends importance to what is said here of the various methods of determining "lives in being". If such a saving clause is frequently employed it will obviously be desirable for some more certain judicial definition to be made.

Another example of the same kind of difficulty was found in *Re Legh*, [1938] Ch. 39. Here the limitation was to two daughters as tenants in common with a gift over of the whole to the survivor. Although the daughters took a vested interest in common within the period the limitation over failed, because the survivor was not ascertained within the period. In this case it was not, of course, a question of ascertaining a life for the purposes of the rule but of determining the date of vesting. It is submitted, however, that the same problem exists in ascertaining a life. So, a gift to take effect during the life of B's wife is not too remote, if it is shown that B had a wife at the date that the instrument became operative. A gift to take effect during the life of any wife B might marry

would be invalid, whether or not he was married at the date of the instrument, because he might be married a second time: *Re Coleman*, [1936] Ch. 528. The survivor of a class is in much the same position. If all the class is ascertained at the time the instrument became operative the survivor is an ascertained life. Otherwise, apparently, no member of the class can normally be regarded as unascertained.

Closely related to the question of ascertainment of the "life" is the question of the ascertainment of its expiration. It is well settled that the expiration of the lives taken must be provable without too much difficulty. If it is not the gift fails, not for uncertainty so much as for perpetuity. The lives are known, but the difficulty of proving the cesser would lead to indefinite postponement of vesting. This is a factor which must be borne in mind when the number of concurrent lives is taken. The Court may hold that the difficulty of proving the survivor avoids the gift altogether. In *Re Villar* (*supra*) the survivor of a hundred eminent persons, many of them residing abroad, was held not incapable of practicable ascertainment. In *Cadell* v. *Palmer* (1832), 1 Cl. & F. 372, the survivor of twenty-eight persons known to the testator was held a valid life. The Court in *Re Villar* (*supra*) deprecated the choice of a large number of lives, with the consequent expense of proof entailed, but held that it was bound to admit the validity of the method used. It is impossible to draw a definite line between valid and invalid limitations under this principle; each case will have to be decided on its facts.

Incorporation of a "life in being" in a settlement.

The more difficult question now arises concerning the method by which a "life" may be incorporated into a settlement for the purpose of determining the validity of postponement of vesting. The case law on this aspect of the subject is not large and operates more by inference than by an express statement of judicial opinion. I would state the rule as follows: "Wherever an interest is limited so as necessarily to vest, if at all, during the life of a living person (as defined in the above section) or upon such person's death, that person is a 'life in being' for the purposes of the Perpetuity Rule." This places the emphasis upon the relation between the selected life and the date of vesting and does not require any relation between the "life" and the beneficial interests under the settlement. It is submitted that little difficulty should be experienced in ascertaining in any particular case whether the relation of the vesting to *any* life is such as I have described. At the same time doubts about the validity of such a general statement of the rule have been

expressed, and " life in being " is sometimes thought to be limited to one or two common types.

Dr. Cheshire (at p. 467 of the latest (4th edition) of his Real Property) has given a restricted scope to the definition of " life in being ". He limits the lives which can be taken either to lives specified, chosen or designated as such or the lives of persons entitled to vested interests in priority to the grantee of the contingent interest. This treatment differs from that appearing in earlier editions of the same work, where a wider, and it is respectfully submitted a more accurate, statement of the rule appears, thus suggesting that the learned author may have modified his earlier views. It is felt that, although a wide interpretation of " choice " or " designation " would leave his statement unobjectionable, a wrong impression may be received, especially as the illustration of a prior vested life interest as a case of " implication ", and the only case, suggests that lives are only " designated " if some such form as " on the death of A " or " upon attaining thirty during the life of A " is used.

An analysis of some of the cases in which a life has been incorporated into the period will show that several varieties of " incorporation " have in fact been admitted. It is, however, submitted that this examination will also show that the Courts have not limited the incorporation to any one or two methods nor even to those which have already been before them.

In the first place an interest may be limited so as to vest only (or within twenty-one years) after the death of an ascertained person. This may be done in two ways. The interest may be immediately preceded by a life interest in the ascertained person, the expiration of which resolves the contingency, such as " To X for life, remainder to the eldest surviving child of X ". This is the oldest form of postponement and requires little comment. It is the least objectionable method, since the possession of the estate being necessarily deferred there is little harm in postponing the vesting of the interest for the same period. Successive life interests may be granted, so that the interest will only vest on the death of the survivor. Historically, this method copies the limitation of the common law contingent remainder.

Another method of vesting on death is to limit the estate or interest conditionally to the grantee, upon the death of a living person or upon the death of the survivor of several living persons. The " life " taken need not here take any interest himself. In *Thellusson* v. *Woodford* (1805), 11 Ves. 135, the payment of a large fortune was postponed till the death of a number of named

living persons, the actual beneficiaries being their eldest male descendants. The House of Lords upheld the limitation. It had been argued that there was no warrant for such an abuse of the law and that postponement of vesting could only be justified if the "lives" took interests in the property. Macdonald, C.B. (at p. 137) advised that "the principle is the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater or less whether the lives taken have any interest, vested or contingent, or have not, nor whether the lives are those of persons immediately connected with or immediately leading to that person in whom the property is first to vest". Similarly, in *Cadell* v. *Palmer* (1832), 1 Cl. & F. 372; 10 Bing. 140; 7 Bligh (N.S.) 202, a limitation by way of executory devise was held good, though it would not vest until the expiration of twenty years from the decease of the survivor of twenty-eight named persons living at the testator's death, of whom seven only were given interests under the devise. The advantage taken by draftsmen of the breadth of these decisions has led to the utilisation of strangers in the instrument as expressed "lives in being", a practice of which *Re Villar* (*supra*) is a striking example. It was also this practice which in *Re Vaux* (*supra*) seems to have discouraged the learned Judge at first instance from guessing which "lives in being" could be implied in the will, because the choice, under the *Re Villar* rule, is almost unrestricted.

In the second place an interest may be limited to vest at some time during the life of a living person. A simple example is a gift to X and his heirs upon X's marriage, X being a living person, or to Z upon the marriage of X. As X must marry during his life both gifts are good, since the interest will vest during X's lifetime if it vest at all.

Three special forms of this type of "life in being" have come before the Courts. A gift or devise may be made to X in fee simple at the age of fifty, or a devise to X in fee simple on surviving the testator for twenty-five years, or a gift to X may be made by deed to take effect, if X then be alive, thirty years from the date of the deed. If X is in being at the time the instrument comes into operation the vesting must take place, if at all, during a "life in being", X's own life. A case in point is *Lachlan* v. *Reynolds* (1851), 9 Hare 796, where the testator gave property to certain named persons, the vesting of which was postponed till thirty years after his death. It was held that the true construction of the gift was as a gift to such of those persons alive at the date of the testator's death as should be alive thirty years later, and that it was perfectly valid. Again, a contingent gift of a life interest to

an existing person can never be too remote unless it is dependent upon other interests themselves void for perpetuity (see *Re Abbott*, [1893] 1 Ch. 54; *Re Hewett's Settlement*, [1915] 1 Ch. 810; *Re Coleman*, [1936] Ch. 528).

An example of a valid limitation would be a simple gift to " my son John for life upon his son or grandson becoming a Member of Parliament ", or " to my son John for life upon the failure of issue of X ". The nature of John's interest, limited as it is to his own life, operates in the same way as a saving clause such as " during the life of John ".

A third form of this type of " life in being " appears where interests are carved out of an estate for the life of another, for it is obvious that the life of that other is the maximum duration of any interests so created, and they must vest before his death or never. The *cestui qui vie* is thus the " life in being " as clearly as if the interests limited out of the estate *pur autre vie* had been qualified by the express phrase " during the life of X ". Once this is realised the precise nature of the limitations of the estate becomes immaterial and they may include forms which would be invalid were it not that the nature of the subject-matter limits their maximum duration and, *a fortiori*, their initial vesting, to the period of the life of a living person. In *Bengough* v. *Edridge* (1827), 1 Sim. 173, limitations to the unborn son of an unborn son were upheld, since they were limited out of an estate to endure only until the death of the survivor of twenty-eight living persons. In *Low* v. *Burron* (1733), 3 P. Wms. 262, an estate for three concurrent lives was validly limited on terms which included a gift over on indefinite failure of issue. It should be noticed here that the " life in being " which preserves the validity of these interests is not necessarily referred to directly or indirectly in the instrument creating the limitations. It arises by implication from the nature of the interest which is subject to the limitations.

The third type of " life in being " occurs where the interest limited must vest either during or, at the latest, at or within twenty-one years after the expiration of, the life of an existing person. A common example is the limitation to " eldest son of A if he shall attain twenty-one ". It is clear that a gift to the child of a living person must take effect during the life of that person or shortly afterwards. Once it is realised that the coincidence of the lives of parent and child is the only essential, it will be seen that the variety of valid limitations is considerable. Thus, a bequest to " such of the testator's grandchildren as shall attain twenty-one " must be valid, since the testator's children must be

in esse at his death and will form "lives in being", and their children must be *in esse*, at latest, at the parents' death and attain majority within twenty-one years thereafter. The leading case is the decision of the Court of Appeal in *Re Lowman*, [1895] 2 Ch. 348. The relevant limitation there was to the testator's nephew Hugh, for life, with remainder to the sons of the testator's niece Flora. All the limitations were upheld. Lopes, L.J. (p. 367) pointed out that "the money could not possibly vest in any person who would not come into existence during a life then in being. The nephew and niece were alive at the death of the testator and if they had children those must be born during their parents' lives, and a period of gestation afterwards if gestation existed". In this case it will be noted that Hugh and Flora were shown to be in being by their being named in the will; they were not themselves, of course, children of the grantor. Lindley, L.J., succinctly expressed his view: "These persons were living at the death of the testator, and they must have children, if at all, in their own lifetime." Kay, L.J., concurred: "As the children of [Hugh and Flora] must have been born, if at all, within the compass of a life in being, in no possible event could the rule against perpetuities be infringed." The recognition of this principle came long before the authoritative decision. For example, in the case of *Proctor* v. *Bishop of Bath and Wells* (1794), 2 H. Bl. 358, a devise had been made to the first son of T. P. to enter into holy orders. The argument turned on the fact that such a son might not become ordained until an age exceeding twenty-one years and there is no doubt but that a "gift to the first son of T. P." would have been upheld. A gift in favour of such of the children of A B as attained the age of twenty-one years was upheld in *Watson* v. *Young* (1885), 28 Ch. D. 436.

An examination of many other nineteenth century cases shows that the postponement of vesting in the children of a named person until an age exceeding twenty-one was often the only reason for invalidity (for example, *Griffith* v. *Blunt* (1841), 4 Beav. 248; *Boreham* v. *Bignell* (1850), 8 Hare 131). Had the children been entitled at twenty-one these decisions would have gone the other way, as the judgments clearly imply. The birth or majority of the children of existing persons may also be the valid contingency on which an interest vests, without such children themselves taking any interest in the property. This proposition is supported, if confirmation is necessary, by a *dictum* of Romilly, M.R., in *Packer* v. *Scott* (1864), 33 Beav. 511, the Master of the Rolls saying (at pp. 512—513) that "If the limitation had been to the great-grandchildren of A B, such great-grandchildren to take when the

child of a living person attained twenty-one, I should hold the gift perfectly good ".

In all these examples, which could, of course, be multiplied, the ascertained " life " for the purposes of the rule is normally apparent on the face of the instrument creating the limitation, but it is to be noted that in most cases they are not " specified, chosen or designated " as such. For example, in *Re Lowman* (*supra*) Flora did not herself take a beneficial interest and her existence was only of indirect relevance to the limitation, since she was mentioned simply as a means of ascertaining the beneficiaries intended to take. This is the obverse case to that of *Re Villar* (*supra*), where the vesting of the limitation is determined by reference to specified or designated persons. It also emphasises the essential problem that is at the root of the decision in *Re Vaux* (*supra*).

Assuming that we adopt the phraseology of Mr. F. E. Farrer (2 K. & E., 14th ed., p. 1047) that the life must be " selected in or apparent on the face of the instrument ", we are still left to decide by what rules the life may be " apparent ". It is probably fair to say that a life is " selected " when either the contingent interest is limited to vest after a prior life interest or is clearly dependent upon the dropping of a life by way of executory limitation over or a life or lives are designated with reference to the contingency as under the principle in *Re Villar* (*supra*). It is clearly " apparent ", for instance, in a gift to a testator's grandchildren, since the testator's children are lives in being though they do not take any interest under the will. In such a case there is at least an implied reference to them. But if the gift is preserved by a general restriction such as that a gift shall take effect " within the limitations prescribed by law ", it remains necessary to find some method of determining what lives may be employed to ascertain the extent of the period at disposal. It is submitted that the " lives " must bear some relation to the instrument, but that the Courts have not yet laid down any hard-and-fast principle for including or excluding any specific lives. It is thought that it may be arrived at in several ways. First, it may be implicit in the description of the beneficiaries, as, for example, in a gift to " grandchildren " by a testator but not by a settlor during his lifetime, unless " grandchildren " is to be construed by reference to grandchildren living at the date of the settlement. Secondly, it could be governed by the prior limitations under the settlement, provided the persons are ascertained and in existence at the date that the instrument takes effect. Thirdly, it could be by reference to persons, such as trustees or donees of a power, provided that such trustees or donees are ascertained as in existence at the date of the

instrument but not, for example, the "trustees for the time being" of a settlement. The position of donees of a power is sufficiently important to call for special mention.

Powers of appointment.

As an appointment under a special power is read back into the original instrument creating it, the donee-appointor may incorporate in his appointment, as a "life in being", any person in existence when that original instrument came into operation (*Gray's Perpetuities*, 3rd ed., 428; *Lewin's Perpetuities*, 2nd ed., 489; *Jarman on Wills*, 7th ed., 290). The only reported instances of the exercise of this power concern the donee's incorporating his or her own life. The donee of a power is very commonly given a life interest immediately prior to the interest the subject of the power, and this tends to obscure the issue, since the life tenant is a "life in being" chosen in the settlement in any case (for an instance of such a donee using her own life as a life in being, see *Re Thompson*, [1906] 2 Ch. 199). But this is merely coincidence, and a donee without any interest in the particular property appointed used her own life, in *Hutchinson* v. *Tottenham*, [1898] I. R. 403, as a life in being. She appointed to such of her daughter's children as should be born during her (the mother's) life. Such appointors usually take some interest under the settlement and, as donees of a special power are, of course, referred to in the settlement.

A more interesting question seems never to have been the subject of judicial pronouncement, namely, can a donee of a special power refer, as a "life in being", to some person not mentioned in the settlement, in order to postpone the vesting of an appointed interest? In particular, can a donee utilise as a "life in being" the life of some person never known to the settlor? That a donee of a special power may profit by knowledge acquired after the creation of the power is demonstrated by the rule in *Re Paul*, [1921] 2 Ch. 1, in which case an appointment by a donee to her son "at twenty-five" was upheld in view of the fact that her son was already over four years of age and would necessarily take at latest, if he took at all, within twenty-one years of her death. It is submitted that this rule is not limited to the question of ages and that strangers to the settlor may be incorporated as "lives in being" in an exercise of a power. Thus, if a power be given a son, by a will, to appoint to his wife and children, the son, on marrying after his father's death, should be able to appoint to his children "at the death of their mother", provided his wife is known, at the time of the appointment, to have been alive at the time of his father's death. Such an appointment is reasonable and this rule would

eliminate the often ridiculous consequences of the application of the perpetuity rule to direct limitations of a similar nature. A direct limitation to children of a son on the death of any wife he may marry is, under the strict rule in *Re Harvey* (1888), 39 Ch. D. 289, void for remoteness, the law imagining that the son may marry a woman unborn at the time of the original settlement.

The question is of importance to special powers only because the perpetuity period runs, in the case of a general power, from its exercise only. Thus, in *Re Flower* (1885), 55 L. J. Ch. 200, a wife validly appointed, under a general power given in a marriage settlement, to her son Thomas for life, with remainder to his children in fee simple. Thomas was of course unborn at the date of the settlement, but was a " life in being " at the time of the appointment and the gift over to his children was good.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Hire-purchase — minimum payment — whether enforceable on liquidation.—In *Re Apex Supply, Ltd.*, [1941] 3 All E. R. 473, a hire-purchase agreement contained two relevant clauses: (i) on liquidation of the purchaser the hirer could retake possession; and (ii) if the hirer retook possession within nine months the purchaser should pay a certain sum calculated by reference to the instalments paid with a gross sum.

It was argued that such a sum was a penalty and in any event such a claim was in fraud of the bankruptcy laws, and consequently no claim for the balance of the gross sum could be put forward in the liquidation. Simonds, J., held that (i) it was not a penalty, and (ii) it was not in fraud of the bankruptcy laws.

On the first point the learned Judge, following a number of cases, most of which are not directly reported but appear in Jones & Proudfoot's *Notes on Hire-Purchase Law*, 2nd ed., came to the view that such a sum is neither a penalty nor liquidated damages, but part of the consideration for the hire of the article during the period of less time than nine months. He did, however, hold that if it was to be regarded as in the nature of a penalty it was a genuine pre-estimate of damages and so not a penalty.

On the second point the learned Judge was influenced by the fact that the circumstances in which the sum was payable included both return by the purchaser and retaking by the hirer and that the hirer could retake in other cases besides that of liquidation.

The essential feature of a fraud on the bankruptcy laws in this connection is a provision to enable a person to get more money if the debtor went bankrupt than if he did not; see *Re Johns*, [1928] Ch. 737. This was not the case here because the hirer might have had occasion to retake the goods without liquidation. In *Re Johns* (*supra*) the learned Judge cited a passage from Tomlin, J., in which that learned Judge refers to "a deliberate device". Consequently, it would appear that if the primary purpose of the clause was to evade the bankruptcy laws it would be invalid despite the inclusion of some other contingency, but this would undoubtedly involve difficulties of construction.

Emergency legislation—post-war contracts—relief under the Courts (Emergency Powers) Act, 1939.—Re Middlesex Brick Co., Ltd., [1941] 3 All E. R. 410, decided the short point that owing to the peculiar wording of section 1 (5) of the Courts (Emergency Powers) Act, 1939, in the case of proceedings in bankruptcy or winding up relief could be claimed under the Act in respect of post-war as well as pre-war contracts so long as inability to fulfil them was due to "circumstances directly or indirectly attributable to any war . . ." In such circumstances the Court could in its discretion stay any proceedings under the petition for bankruptcy or winding up. This distinction between this and all other cases is that the sub-section makes no reference to the time at which the debt was incurred.

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2. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Administration of assets — executor's year — executors delay payment of deceased's debts—whether a devastavit as against legatees.—Interesting questions as to the significance of the so-called "executor's year" arose in *Re Tankard, Tankard* v. *Midland Bank Executor and Trustee Co., Ltd.*, [1941] W. N. 232; [1941] 3 All E. R. 458. Beneficiaries under the will of a testator there claimed damages against his executors for an alleged *devastavit*, and asked for an order for administration. The ground of complaint was that, whereas the executors ought to have paid the debts of the deceased within a year from his death, they in fact delayed such payment until eighteen months after the death; that certain shares, which it was necessary to sell for the purpose, fell substantially in value during this period; and that, in consequence the executors' delay in realising the shares had caused loss to the estate.

Uthwatt, J., decided in favour of the executors, and reached the following conclusions as to the law applicable. (i) There is no rule of law that it is the duty of executors to pay debts within a year from the testator's death. Their duty is merely to pay with due diligence. Thus, factors such as the circumstances of the estate and the nature of the assets may justify payment outside the year. (ii) If executors delay payment of debts until after the year has expired, the onus is upon them to show that their delay is justifiable on the facts. (iii) The duty to pay with due diligence is not confined to interest-bearing debts. (iv) The duty to pay with due diligence is owed not only to creditors but also to beneficiaries under the will of the deceased. (v) As against creditors, any provisions of the will which purport to increase or relax the duty of executors to pay with due diligence, or which concern the realising of assets for the purpose, are irrelevant. (vi) But the rights of a beneficiary under a will are determined by the terms of the will: accordingly, as against a beneficiary, apt provisions of the will may modify the normal duty to pay debts and realise assets for the purpose without undue delay.

In applying the above rules to the facts before him, the learned Judge was not convinced that the nature and circumstances of the estate had presented any particular difficulties in its administration. From this it followed that the executors had failed to discharge the onus, placed upon them by rule (ii) above, of justifying their failure to pay the debts in question within the executor's year. But the deceased's will had expressly empowered the executors, at their absolute discretion, to retain any part of his assets in its existing state of investment. Such a power, if duly exercised, would be a complete answer to the present claimants—the beneficiaries under the will. It appeared that the executors had carefully watched the market, in order to decide when to sell the shares concerned; they had consulted stockbrokers on the matter from time to time and had been uniformly advised to retain the shares; and, in the result, knowing the shares to be speculative, had "thought it right, in the interests of the estate, to give the speculation a fair run" (3 All E. R., at p. 465). The learned Judge was therefore satisfied that their delay in realising these shares was a deliberate and proper exercise of their power to retain—it was not attributable to any failure by the executors to exercise their judgment in the matter. Accordingly, although their delay had caused loss to the estate, they had committed no breach of duty to the beneficiaries under the will; and the action failed.

(2 K. & E., p. 572, n. (*b*).)

Administration of assets—partnership continued by executors—profits of partnership—whether capital or income—apportionment by conventional accounting periods.—When a partner dies, questions may arise as to whether his share of any profits of the partnership should be regarded, for the purposes of his estate, as income or as capital. In *Browne* v. *Collins* (1871), 12 Eq. 586, where the partnership accounts were made up half-yearly, it was held that, whereas profits declared in respect of a complete half-year prior to the death were capital, those declared in respect of the half-year during which the partner died should be regarded entirely as income. "In every partnership it is found convenient to take conventional periods, yearly or half-yearly, for the particular purpose of ascertaining losses and profits. . . . I consider that until the whole of a period has passed not a farthing of profit has been earned": *per* Wickens, V.-C., at p. 593. Such was the reasoning, before the Apportionment Act, 1870, for refusing to apportion, as at the testator's death, profits subsequently declared in respect of the conventional period during which he died. In *Jones* v. *Ogle* (1872), 8 Ch. App. 192, and again in *Re Cox's Trusts* (1878), 9 Ch. D. 159, the Act of 1870 was held to have made no alteration here—on the somewhat slender ground that profits thus declared are not a "dividend" or "periodical payment" within the meaning of that Act. Accordingly, the rule in *Browne* v. *Collins*, *supra*, stands.

Re Robbins, Midland Bank Executor and Trustee Co., Ltd. v. *Melville*, [1941] Ch. 434, has raised these questions afresh. Here the testator and his brother were joint owners of two London theatres under an oral partnership at will, whereof the accounts were made up annually. By his will, he authorised his executors to carry on the business "either in partnership or otherwise". They accordingly did so, on the same terms as he had done. By the will, he had settled his estate in equal half-shares, of which A and B were respectively tenants for life. (1) As regards the complete accounting year next before the testator's death, his share of the profits declared was held to be *capital* of his estate. In fact, as had been his custom, the testator had allowed most of these profits to remain in the business, standing to his credit. Counsel therefore urged that they were caught by a clause in his will, to the effect that "rents dividends and other periodical payments in the nature of income accrued but not received at the date of my death shall be treated as income and not as capital". Simonds, J., decided, however, that this clause was inapplicable, on the ground (already established by the above decisions on the Act of 1870) that the profits of a partnership are not "periodical

payments ". (2) As regards the accounting year during which the testator died, the learned Judge again followed the established rule: the whole of the profits declared for this period, in respect of the testator's share in the partnership, were regarded as income; for they are deemed to have accrued wholly after his death. They were therefore to be divided equally between A and B, the life-tenants under the will. " The line must be drawn not at the death of the testator . . . but at the end of the accounting period, for it is only then that it can be discovered whether the business made a profit for the relevant period ": *ibid.*, at p. 440. (3) Whilst the testator's executors were still continuing the partnership business, as authorised by the will, a further accounting year passed. During this year, A died. Thereupon the executors of A claimed that A's estate was entitled to some part of the profits ultimately ascertained in respect of that year. The learned Judge held that this claim failed: here again (on analogy to the established rule) the line must be drawn at the end of the conventional accounting period.

An interesting point, in relation to decision (2), is that the partnership would seem, by the general law, to have been automatically dissolved when the testator died; for it was a partnership at will (see also Partnership Act, 1890, s. 33 (1)). It was thus arguable that his executors, carrying on the partnership as authorised by his will, were really entering into a new partnership. And from this it would seem to follow that an apportionment should have been made as at the date of his death—all profits up to that time being regarded as *capital*. This point was argued. But Simonds, J. (at p. 440), considered it to be immaterial, in a case of this type, " where the business is carried on under the direction of the testator, so that there is one continuous period in which it is conducted, first by the testator, and then by the executors under his directions ".

(2 K. & E., p. 841, n. (*g*).)

Construction—hotchpot clause—whether applicable to life and reversionary interests.—When a hotchpot clause is drafted sufficiently widely, questions may arise as to whether and how life interests and reversionary interests should be brought into hotchpot. In this respect, Jessel, M.R., is reported to have said, in *Eales* v. *Drake* (1875), 1 Ch. D. 217, 219, " it is quite clear that both life interests and reversionary interests must be brought into hotchpot ".

When a settlor or testator gives to each of his children a share of a fund for life and a power to appoint the corpus of the share among issue, with provisions for the issue in default of appointment, a hotchpot clause is commonly inserted whereby any child of such children who or whose issue shall "*take*" any part of the fund, by virtue of an appointment, must bring into hotchpot the interest so appointed before he can claim anything under the provisions in default of appointment. The effect of a hotchpot clause should apparently be judged when the clause operates—*i.e.*, when it becomes necessary to distribute the unappointed part of the fund. When that moment arrives it may be clear that, of those *prima facie* entitled in default of appointment, A has already obtained a vested life interest by virtue of an appointment in his favour, whereas B has been appointed only a defeasible reversionary life interest which will never come into being. In such a case, A must clearly bring into hotchpot the value of his vested life interest. But B has never "taken" and never will "take" any part of the fund, within the meaning of the hotchpot clause. Accordingly, as was held in *Re West*, [1921] 1 Ch. 533, his frustrated life interest need not be brought into account.

An alternative ground for the decision in *Re West*, *supra*, was that so long as an appointed interest is contingent or uncertain the appointee cannot be said to "take" any part of the fund, within the meaning of such a hotchpot clause. This is the basis of the recent decision in *Re Gordon*, *Public Trustee* v. *Bland*, [1942] W. N. 14; [1942] 1 All E. R. 59. In that case, Margaret and Isabel, two granddaughters of the original testator, were claiming to share in so much of his trust fund as had passed on default of appointment. To each granddaughter and her issue, a share of the fund had already been appointed as follows: (i) to her for life; (ii) remainder to her children who should attain twenty-one or marry; (iii) in default of such children, for such persons as she might by will appoint. When the moment came for distributing so much of the trust fund as passed on default of appointment, Margaret had three infant children (under ten years of age) and Isabel was as yet childless. On these facts, Uthwatt, J., decided that (i) should be brought into hotchpot; but that (ii) and (iii) should be ignored, because they gave only uncertain or contingent interests in the fund. In other words, the learned Judge has held that the *dictum* of Jessel, M.R., quoted above, ordinarily applies only to vested interests.

This decision, though concerned with the construction of a will, appears to apply equally to hotchpot clauses contained in settlements *inter vivos*. But it should be borne in mind that, like other

decisions upon questions of construction, it turned upon the words (especially the word "take") which the particular document had employed. A hotchpot clause, more widely drawn than is usual, might well embrace even interests which are contingent or uncertain.

(2 K. & E., pp. 586, n. (*s*), 896, n. (*k*).)

Probate — devolution of residue as bona vacantia — application by Crown for grant of administration with will annexed—whether citation of legatees and creditors required.—Rule 119 of the Non-Contentious Rules of the Principal Probate Registry fixes the present order of priority of right to a grant of administration *cum testamento annexo*. This order of priority, so far as it concerned *In the estate of Hanley*, [1941] W. N. 217; [1941] 3 All E. R. 301, is approximately as follows: (i) "the persons entitled upon an intestacy"; (ii) "legatees or devisees, or creditors"; (iii) "the Crown". The deceased, in that case, had left a will whereby she bequeathed several pecuniary legacies. But her will contained no residuary gift and no appointment of executors; and she left no known next-of-kin. In these circumstances, the Attorney-General claimed that the Crown was "entitled upon an intestacy", and was accordingly entitled to a grant of administration in priority to legatees and creditors of the deceased. This claim failed, both before Lord Merriman, P., and in the Court of Appeal. Although section 46 of the Administration of Estates Act, 1925, provides that where there are no statutory next-of-kin the Crown is entitled to any undisposed-of residuary estate, that section states expressly that the residue then "shall belong to the Crown . . . as *bona vacantia*". The words of rule 119 must be construed in the light of section 46. In consequence, rule 119 must be taken to mean that when the Crown takes residue as *bona vacantia*, under a partial intestacy, it is intended to have the lowest claim to a grant of administration.

This decision, be it noted, implies that the Crown, taking residue as *bona vacantia*, is not "entitled upon an intestacy" within the meaning of rule 119. It may be that this curious construction might be supported by arguing (if one can safely do so) that, if the Crown (claiming *bona vacantia*) is within group (i), there would have been no point in mentioning the Crown in group (iii). But this argument was not offered, it seems, and would not perhaps be sound. The unfortunate result of the decision, from the standpoint of the Crown, is that the Crown

cannot obtain a grant of administration in such a case without first citing all the creditors, if any, as well as any legatees and kin of the deceased.

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3. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Covenant by lessor to pay £500 if lease ended or was determined—power for lessee to continue in possession and demand new lease if lessor unwilling to pay—covenant not binding on assignee of reversion.—A very interesting point as to covenants running with the reversion arose in the case of *Re Hunter's Lease, Giles* v. *Hutchings* (1941), 58 T. L. R. 116.

A lease for a term of five years was determinable by the lessee by three months' notice. The lessor covenanted that at the end of the term or on such determination he would pay the lessee £500. If the lessor did not wish to pay, the lessee was to be entitled to demand a new lease for another five years on the same terms, including the covenant for payment of £500. After the end of the five years the lessee remained in occupation but without the grant of a new lease. At the end of ten years the defendant, the assignee of the reversion, was willing to grant a renewal, but the lessee chose to give up possession and demanded the £500.

It was held by Uthwatt, J., that the covenant for payment of £500 did not run with the reversion so as to bind the assignee. Under section 142 of the Law of Property Act, 1925, which now governs this subject, only those covenants run with the reversion so as to bind the assignee which "touch and concern the thing demised" and would have bound the assignee prior to the Conveyancing Act, 1881. A covenant for the payment of a sum of money "in gross" does not touch and concern the thing demised; it is in the same class as all other covenants to do something for the personal benefit of the lessor, or for the advantage of his business, and not connected with the relationship of landlord and tenant: see, for instance, *Thomas* v. *Hayward* (1869), L. R. 4 Ex. 311. But an option for renewal, unlike an option to purchase, has been held to bind the assignee: *Muller* v. *Trafford*, [1901] 1 Ch. 54, at p. 60; *Woodall* v. *Clifton*, [1905] 2 Ch. 257, and it was argued on behalf of the lessee here that the covenant for payment of £500 did not stand alone but was part of a composite arrangement whereby the lessee had an option for a further lease, which the lessor could avoid by paying £500.

The learned Judge rejected this construction of the covenant, holding that the primary obligation was the obligation of the lessor to pay £500 on the expiration or determination of the lease, with an added alternative that with the concurrence of both parties a new lease could be substituted for the money payment. On this construction of the covenant it did not touch and concern the thing demised, and accordingly the assignee of the reversion was not liable to pay the £500.

(Woodfall, 24th ed., pp. 548, 560.)

Notice to quit agricultural holding—sent by ordinary post and not registered post—whether properly served.—In *Sharpley* v. *Manby* (1941), 58 T. L. R. 91, the landlord of an agricultural holding sent to the tenant by ordinary post a notice to quit which quoted as the reason for the notice the fact that, amongst other matters, the tenant had failed to pay upon demand the rent due from him. In fact the previous notice requiring payment of rent due had also been sent in the form of a letter by ordinary post.

By section 53 of the Agricultural Holdings Act, 1923, any notice under that Act may be served on the person to whom it is to be given either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there. It was, accordingly, contended that both the notice requiring payment of the rent due and the notice to quit were improperly served and invalid, having been sent by ordinary post and not in registered letters.

It was held by the Court of Appeal that, provided receipt of the letters was admitted or proved, the notices were properly served. There is nothing in the Agricultural Holdings Act requiring any solemn ceremonial for the service of such notices. Contrast was drawn by the Court with the Agricultural Holdings (Scotland) Act, 1923, which sets out certain ceremonial methods of serving notices, whereby service by unregistered post has been held to be excluded: *Department of Agriculture for Scotland* v. *Goodfellow*, [1931] S. C. 556.

It may be noted that the language of section 53 is permissive only and not exclusive—"*may* be served". Of course, the difficulty in practice is that receipt of the notice sent by ordinary post may be denied and will then have to be strictly proved. On the other hand, the section does not actually say that proof of posting by registered post is proof of service. This introduces the

interesting question whether the notice is duly served if sent by registered post and lost in the post, and it seems to the writer that the intended recipient could, under the section, be heard to say that the registered letter was not received. Possibly, if he could prove that, there would have been no effective service despite the words of section 53. This section is not so strongly worded as section 196 of the Law of Property Act, 1925, which says that the notice under that Act is *sufficiently served* if sent by registered letter addressed to the person to be served . . . if that letter is not returned through the post office undelivered.

Another point suggested by *Sharpley* v. *Manby* is whether even an oral notice to quit, if proved to the satisfaction of the Court, would be sufficient. This is an interesting speculation and, construing section 53 in the manner now laid down by the Court of Appeal, it is difficult to see how such a notice could be ruled out in law.

(Woodfall, 24th ed., pp. 955, 967, 979.)

Furnished premises requisitioned under Defence Regulations—doctrine of frustration inapplicable—tenant continues liable for rent.—In *Swift* v. *Macbean* (1941), 58 T. L. R. 110, the tenant of furnished premises was held liable for payment of the rent notwithstanding that the premises had been requisitioned under defence regulations. Birkett, J., held that the doctrine of frustration had no application, the ground of decision in *London and Northern Estates Co.* v. *Schlesinger*, [1916] 1 K. B. 20; *Whitehall Court, Ltd.* v. *Ettlinger*, [1920] 1 K. B. 680; and *Matthey* v. *Curling*, [1922] 2 A. C. 180, applying equally to furnished as to unfurnished lettings, because in either case an estate by demise for a term of years is created.

The question of the certainty of a term for the duration of hostilities was also raised in this case, and the decision may be cited as authority for the validity of such a limitation as a term of years certain: see *Great Northern Ry.* v. *Arnold* (1916), 33 T. L. R. 114.

(Woodfall, 24th ed., pp. 219, 342.)

Lease of licensed premises—grant of licence conditional on monopoly value payment—capital payment for income tax purposes.—Where the lessee of licensed premises agrees to pay all

charges in respect of licences which might be imposed by the Licensing (Consolidation) Act, 1939, and the justices impose a monopoly value payment, this is a capital payment for the purpose of the lessee's income tax and is not deductible against income: *Henriksen* (*Inspector of Taxes*) v. *Grafton Hotel, Ltd.* (1941), 58 T. L. R. 64.

(1 K. & E., p. 1029.)

Distress upon goods of bankrupt—trustees charge upon proceeds of sale in favour of priority creditors.—The case of *Re Caidan, ex p. Official Receiver* v. *Regis Property Co., Ltd.* (1941), 58 T. L. R. 66, illustrates the operation of section 33 of the Bankruptcy Act, 1914.

By that section, which establishes a class of priority debts, if a landlord or other person distrains on goods of a bankrupt within three months before the receiving order, the priority debts are a first charge on the goods distrained or the proceeds of sale, but there is a proviso that "in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made".

In this case the bankrupt was the tenant's wife and she carried on business on the demised premises. Within three months before the receiving order a bailiff distrained on her goods on behalf of the landlord. The distress was sold for £50. The assets were insufficient to pay the priority debts.

It was held by Morton, J., that section 33 enabled the trustee in bankruptcy to enforce a charge against the landlords on the proceeds of sale, in favour of the priority creditors. This charge arose on the making of the receiving order, and since the proceeds of sale were less than the priority debts, the landlords were liable to pay the whole of the £50 to the trustee in bankruptcy. Although the landlords were not the landlords of the debtor herself, they were an "other person distraining" within section 33, and accordingly were bound by the section.

A subsidiary point illustrated by the case is that the bailiff who distrained did so in the capacity of agent for the "landlord or other person", and it is the latter, into whose hands the distress or proceeds of sale have passed from the bailiff, who is liable in respect of the charge.

(Woodfall, 24th ed., pp. 469, 878.)

War damage—rent paid in advance—section 13 of Landlord and Tenant (War Damage) (Amendment) Act, 1941, not retrospective.—Where rent has been paid in advance and during the period for which it has been paid the demised premises have suffered war damage, and a notice of disclaimer becomes effective, so that under section 8 (2) of the Landlord and Tenant (War Damage) Act, 1939, the lease is deemed to have been surrendered as from the date of the damage, the effect of section 13 of the Amendment Act of 1941 is to make the rent (though paid in advance) apportionable as at that date, so that the portion apportioned to the period subsequent to the surrender can be recovered by the lessee. But this section is not retrospective and does not apply to rent paid before August 7, 1941, the date when the Amendment Act came into force: *London Fan and Motor Co., Ltd.* v. *Silverman* (1942), 58 T. L. R. 119. Compare the position prior to the Act of 1941 with regard to a notice to avoid disclaimer: *Turner* v. *Stella Bond, Ltd.* (1941), 57 T. L. R. 395; *The Conveyancer*, Vol. 5, p. 306. The Act of 1941, by section 13, now places all such cases on a common footing and makes the rent apportionable.

War damage to block of flats—determination of tenancy under power contained in the lease—not affected by Landlord and Tenant (War Damage) Act, 1939.—The significant principle to be drawn from *Johnstone* v. *Swan Estates, Ltd.* (1941), 58 T. L. R. 80, is that a contractual power to determine a lease upon the occurrence of war damage is not taken away or prejudiced by anything contained in the Landlord and Tenant (War Damage) Act, 1939.

The facts of this case were briefly as follows. The lease was of a flat on the eighth floor of a modern block of flats known as Swan Court, and the instrument contained provisions of the kind commonly found in such agreements whereby the lessee was restricted to user of the flat as a private residence and was on the other hand entitled to be provided with certain defined services, such as hot and cold water and heating by radiators, and enjoyed the use in common with the lessors and other lessees of the staircases and lifts, gas and water pipes and electric wires. Clause 6 of the lease provided that if the flat or other parts of the mansion should be destroyed or damaged by any means not arising by the act or default of the lessee . . . so as to render the flat unfit for occupation, the lease might be terminated by either the lessors or the lessee by notice in writing served within three months of

the destruction or damage, whereupon the lease would become void as from the date of such destruction or damage.

On September 9, 1940, part of Swan Court was demolished by enemy bombing. The plaintiff's flat was not itself physically injured, but all the services to the flat were completely interrupted and cut off. The following day the lessee's agents served notice of disclaimer under section 4 (2) (a) of the Landlord and Tenant (War Damage) Act, 1939, but the lessors replied denying that the flat was unfit for habitation. The lessee did not embark on any argument as to whether the flat was or was not "unfit" within section 4 of the Act, but instead fell back on clause 6 of the lease. On September 27, 1940, he served on the lessors a notice determining his lease under clause 6. The lessors, however, contended that this clause did not apply to war damage, and claimed rent accruing subsequently to the damage.

Morton, J., held, firstly, that the damage to Swan Court by enemy action was within clause 6, since it did not arise from the act or default of the lessee or any servant or licensee of his. Secondly, he held that, having regard to the subject-matter of the demise and the importance attached by the parties in the lease to the maintenance of the services in working order, the interruption of services consequent upon the destruction of part of the block did render the flat unfit for occupation within clause 6 of the lease. The third point considered by the learned Judge was whether on the true construction of the Landlord and Tenant (War Damage) Act, 1939, and, in particular, section 1 of that Act, the lessee was entitled to determine the lease under clause 6. It was contended on behalf of the lessors that the provisions of that section avoiding any obligation in a lease to make good war damage and extinguishing all remedies (whether by way of damages, forfeiture, re-entry or otherwise) for non-fulfilment of such an obligation, had the effect of extinguishing the lessee's right under clause 6, as this was in effect a remedy for non-fulfilment of the lessors' obligations in respect of the maintenance of services. The argument was that the scheme of the Act was to substitute the arrangements set out in the Act for all private contracts in the event of war damage. Morton, J., rejected this view, however, and held that the right conferred on the lessee by clause 6 was not a right arising out of the non-fulfilment of a lessors' obligation to repair. It was a right independent of any obligation to repair, which arose simply because another part of the mansion had been destroyed so as to render the flat unfit for occupation. There is nothing in the Landlord and Tenant (War Damage) Act to avoid a right of this kind where such is conferred by the contract of tenancy.

The last point which the learned Judge had to decide was whether, by serving a notice of disclaimer first the lessee had prevented himself from determining the lease under clause 6. In other words, was he approbating and reprobating at the same time? The lessors cited *Cooper* v. *Jax Stores, Ltd.*, [1941] 1 K. B. 577; *The Conveyancer*, Vol. 5, p. 305, where it was held by the Court of Appeal that a landlord who had served a notice to avoid disclaimer could not afterwards apply to the Court under section 6 (1) of the Act for a determination that the land was not unfit by reason of war damage at the time when the notice of disclaimer was served. But there the landlord was first conceding that the land was unfit, and then seeking to dispute the fact, whereas in the present case the attitude and intention of the lessee was all along to put an end to the lease, on the ground of the unfitness of the flat for occupation. The learned Judge accordingly held that there was no question here of the lessee seeking to approbate and reprobate at the same time.

(Compare the form of proviso in 1 K. & E., p. 954, which is in very different form but would seem to be governed by the principle of construction laid down by Morton, J., in this case.)

War damage—notice to avoid disclaimer served under wrong section.—In *Price* v. *Mann* (1942), 58 T. L. R. 109, a landlord by mistake served a notice to avoid disclaimer which was expressed to be "on the terms of section 10 of the Act". In fact, the relevant section is section 11. Wrottesley, J., held that the notice was void as ambiguous and misleading—"In fact," he said, "section 10 laid an important liability on a tenant to reinstate the premises in the circumstances there set out, and if on receipt of the notice the tenant here had looked up the Act she might have supposed that she was undertaking that liability."

It is believed that a notice requiring the tenant to retain the lease "on the terms specified in the Landlord and Tenant (War Damage) Act, 1939," without mention of the particular section, is sufficient. There is nothing in *Price* v. *Mann* to cast doubt on this view, and the employment of this simple phraseology obviates the danger of mistakes such as embarrassed the landlord in *Price* v. *Mann*.

(Woodfall Supplement No. 2, p. 105; 3 K. & E. Supplement, p. 20.)

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4. *INCOME TAX CASES.*

By Leonard Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the subjects with which *The Conveyancer* is primarily concerned.]

Income tax — annuity — "after all deductions". — A recent addition to the line of cases dealing with directions to pay annuities without "deductions" is to be found in *Re Best's Marriage Settlement*, 20 A. T. C. 235. It had been provided by a marriage settlement that if (as happened) the wife survived the husband, the trustees should receive from the husband's estate a certain sum to be held on trust to pay the widow, until her death or re-marriage, out of the income of the fund, and, if and in so far as might be necessary, by sale of the investments representing the fund, "such a sum as shall after all deductions amount to £300 per annum". In deciding, as he was asked to do, whether the annuity was or was not payable under deduction of tax, Bennett, J., applied the well recognised principle that in testamentary instruments a provision for the payment of an annuity free of deductions does not of itself entitle the beneficiary to receive the annuity without deduction of tax; the amount will be payable tax free if, but only if, there is something in the context which shows that the reference to deductions was intended to have this effect. The normal application of this rule is in relation to testamentary gifts. Rule 23 of the All Schedules Rules to the Income Tax Act, 1918, provides that every agreement for the making of an annual payment in full without deduction of tax shall be void—*i.e.*, void to the extent that it is an agreement not to deduct tax. Rule 23 deals with "agreements" and does not mention wills, so that there is nothing in the Income Tax Acts to prevent a testamentary annuity from being payable tax free, and the question to be considered, where the annuity is payable without "deductions", is simply whether the testator intended to give immunity from deduction of tax. In *Re Best's Marriage Settlement*, above, the instrument under which the annuity was payable was not a testamentary instrument, but the case was dealt with on the footing that, notwithstanding Rule 23, the principle above referred to was applicable in determining the annuitant's rights. Accordingly, the

decision turned on the question whether there was anything in the context which led to the conclusion that the word " deductions " must be construed as covering income tax. Bennett, J., took the view that no such inference could be drawn from the words " such a sum as shall after all deductions amount to £300 per annum ", which, though modelled on the language commonly used for circumventing Rule 23 of the All Schedules Rules, did not follow it. As to the suggestion that if the word " deductions " did not refer to income tax, it would have no application and would be meaningless, the learned Judge drew attention to the provision for resorting, if necessary, to the realisation of investments in order to satisfy the annuity, and pointed out that expenses incurred in connection with such realisation might, but for the words " after all deductions ", have been considered to be expenses which ought to be borne by the annuitant. Hence, it was not impossible to give a meaning to the word " deductions " without introducing income tax, and in the absence of any clear indication that immunity from income tax was intended, the decision—it was held—must go against the annuitant.

Income tax—assessments under Schedules A and B—whether also assessable under Schedule D.—The decision of the Court of Appeal in *Croft* v. *Sywell Aerodrome*, Tax Leaflet 1152, throws fresh light on the tests to be applied in deciding whether a Schedule A or Schedule B assessment is exhaustive, to the exclusion of Schedule D. The respondent company owned an aerodrome. It granted leases of certain buildings, but, in addition to the rents receivable under those leases, it also derived income from (1) the grant to A of a non-exclusive licence to use the landing-ground, together with the exclusive right to execute repairs and sell petrol; (2) the grant to B and C of non-exclusive licences for the use of the landing ground; (3) the grant to D of a licence to sell refreshments; (4) landing-fees payable by visiting aircraft. On these facts it was contended by the Crown that the Schedule A and Schedule B assessments did not exhaust the company's tax liability, and that it was further assessable either under Case I, or (as the Appeal Commissioners considered) under Case VI, of Schedule D. Affirming the judgment of the Court below, the Court of Appeal decided by a majority (du Parcq, L.J., dissenting) against the Crown, holding that there was no room for a Schedule D assessment either under Case I or Case VI. The judgment delivered by Lord Greene, M.R.

(in which Clauson, L.J., concurred) starts from the principle that a Schedule A assessment is exhaustive in relation to income arising from the exploitation of proprietorial rights in land (including the exploitation by a lessee of such part of the proprietorial rights as he enjoys by virtue of his lease), while a Schedule B assessment is likewise exhaustive in relation to income arising from the exploitation of the land itself. In the case under consideration, the whole of the income derived by the company both from its lessees and its licensees was, in the opinion of the Master of the Rolls, covered by the Schedule A assessment. The grant of a lease was clearly an exercise of proprietorial rights. But the same was true of the grant of a licence to enter upon the land for the purpose (for example) of landing aeroplanes. And if the grant of one such licence would be covered by the Schedule A assessment and would not attract tax under Schedule D, it could make no difference that licences were granted to several different licensees to enter upon the land for several different purposes. It still remained true that, in granting such licences, the company was merely exploiting its rights of ownership. Different considerations would plainly have arisen if the company had itself undertaken the execution of repairs or the provision of petrol or the sale of refreshments. But all that it had done had been to license other persons to enter upon its land for the purpose of performing these operations, and the fact that various trades were being carried on by various licensees of the company on the company's land was no ground for imputing a Schedule D liability to the company. Again, different considerations would have arisen if the company had provided chattels or services for its lessees or licensees, in which case it would have been assessable under Schedule D in respect of such part of the rents and licence-fees as could fairly be apportioned to such provision. But on the facts as found by the Appeal Commissioners it was clear that, if there was any provision of chattels or services, it was on so trivial a scale that an apportionment would have no practical result, and, subject to this, the Schedule A assessment was exhaustive. It will be observed that the Master of the Rolls, having defined the respective spheres of Schedules A and B, took the view that the relevant Schedule in the case under consideration was Schedule A. He added, however, at the conclusion of his judgment, that "if this view is unsound, I would agree that the profits now in question are profits of occupation, which are exhaustively taxed under Schedule B". This decision is an important addition to the well-known line of cases including *Carlisle and Silloth Golf Club* v. *Smith*, 6 T. C. 198; *Governors of the*

Rotunda Hospital v. *Coman*, 7 T. C. 518; and *Salisbury House Estate* v. *Fry*, 15 T. C. 266. Leave was given to appeal to the House of Lords, and the case may go further.

Mining lease — subsidence — "easement" — "rent" — Finance Act, 1934, *s.* 21.—In *Earl Fitzwilliam's Collieries* v. *Phillips*, Tax Leaflet 1137, an unsuccessful attempt was made to cut down the effect of the decision in *C. I. R.* v. *New Sharlston Collieries*, 21 T. C. 69, on the application of section 21 of the Finance Act, 1934, in cases in which a mining lease provides for payments in respect of subsidence. The effect of that section, so far as material, is that rent payable in respect of an easement is to be on the same footing for income tax purposes as a patent royalty. In other words, such rent is payable under deduction of tax and is not deductible in the computation of profits. "Rent" is defined as including (*inter alia*) "a . . . royalty or annual or periodical payment in the nature of rent", and "easement" as including "any right, privilege or benefit in, over or derived from land". In the *New Sharlston Case*, above, a minimum yearly rent and a further acreage rent were payable to the owner of the surface for liberty to work coal thereunder notwithstanding any subsidence which might thereby be caused, but without prejudice to the right to compensation for damage to buildings. On the question whether there was an "easement", it was held that the colliery owners obtained an "easement" within the meaning of the section in obtaining the right to act in such a way as to cause subsidence without exposing themselves to the operation of remedies which would otherwise have been available to the surface owner. In the *Fitzwilliam's Collieries Case*, above, the sums in question were expressed to be payable "as liquidated damages in respect of the overlying surface", but the colliery owners failed to convince Lawrence, J., that there was a material distinction between payments in consideration of being allowed to cause subsidence without being exposed to an action for damages and payments by way of liquidated damages in respect of subsidence.

A further question arose as to whether what was agreed to be paid was "rent". The payments consisted of fixed sums per acre of the seams worked each half-year. In deciding that they amounted to "rent" within the meaning of section 21, Lawrence, J., held that it was immaterial that they were not so described in the lease, and equally immaterial that, from the standpoint of the surface owner, they would or might properly be regarded as capital

receipts. It was true that they were payable once and for all in respect of each acre worked, but the learned Judge pointed out that, apart from other considerations, the definition of "rent" in section 21 of the 1934 Act includes "royalty", and a royalty is essentially a payment once and for all in respect of a particular subject. The payments, in short, though described as "liquidated damages", could by no ingenuity be taken out of the wide definition of rent in section 21.

Surtax—transfer of income to persons abroad — income consisting of profits of trade—Finance Act, 1936, *s.* 18—The decision in favour of the Crown in *C. I. R.* v. *Latilla*, 20 A. T. C. 95 (see *The Conveyancer*, December, 1941, at pp. 146—147) has been affirmed by the Court of Appeal (Tax Leaflet 1147). Section 18 of the Finance Act, 1936, is concerned with a transfer of assets "by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable" to persons abroad. In *Latilla's Case*, above, the question at issue was the meaning of the words "income becomes payable". The transfer was a transfer to a company, in consideration of shares and debentures, of a share in a mining partnership, the mining operations being thereafter carried on by a partnership consisting of the company and an individual. There was clearly "power to enjoy" the income consisting of the company's share of the profits of the partnership. It was, however, contended that section 18 did not apply, since this was not a case in which income could be said to have "become payable" to the company, this expression being inapt in relation to income arising from a person's own exertions. To this the Court of Appeal replied that the share of the partnership's profits which came to the company came to it in accordance with the terms of the partnership. The company's undrawn share of profits would appear in the partnership accounts as a debt owing to the company. The other partner, if the profits were under his control, could be compelled by the company to pay over its share, and "if this is not income 'payable' to the company, we do not know what it is". It does not seem necessarily to follow that the words "income becomes payable" would have been held to be satisfied if there had been no partnership, and the company's income had consisted simply of the profits of a mining undertaking carried on by itself as a sole trader.

Surtax—transfer of income to persons abroad—power to enjoy—Finance Act, 1936, *s.* 18.—The decision in favour of the Crown in *C. I. R.* v. *Lord Howard de Walden* has been affirmed by the Court of Appeal (Tax Leaflet 1148). For the facts of the case the reader may be referred to the note in *The Conveyancer* for December, 1941, at pp. 144—145. It was clear that there had been a transfer of assets resulting in income becoming payable to a person abroad within the meaning of section 18 of the Finance Act, 1936. It was also clear that the appellant had, by means of such transfer, acquired rights by virtue of which he had power to enjoy income of a person abroad within the wide definition of "power to enjoy" in sub-section (3) of section 18. The feature of the case which presented some difficulty was that, having transferred certain assets to companies abroad, and having thereby acquired certain claims on those companies, the appellant had effectively alienated a part of those claims in favour of another person. That being so, was his "power to enjoy" to be limited by reference to that alienation or was it still to be considered to extend to the whole income of the companies? Lord Greene, M.R. (whose judgment was the judgment of the Court) agreed with Macnaghten, J., in holding that the latter view was correct. He refrained from deciding what the position would be if assets were transferred (for example) to a foreign corporation already possessing large assets of its own. He left open the question whether, even in that case, the tax-payer, once fixed with "power to enjoy", could be taxed on the whole income of the foreign corporation, however small the proportion of that income which was traceable to the assets transferred. That case was left to be considered when it arose. The case under appeal was one in which the whole income of the companies in question was, in fact, traceable to the assets transferred to them by the taxpayer, and the Court of Appeal had no hesitation in holding that, notwithstanding the subsequent alienation of a part of his claims upon those companies, the whole of their income must be deemed to be his for the purpose of a section 18 assessment.

Surtax—rescission of contract for sale of shares—were dividends between contract and rescission income of transferor?—The question decided by the Court of Session in *Spence* v. *C. I. R.*, Tax Leaflet 1143, arose from the rescission of an agreement for the sale of shares. S. agreed to sell certain shares to C and transferred them to him in due course. Some years later S took successful proceedings for rescission of the contract on the ground of fraudulent

misrepresentation by C—see *Spence* v. *Crawford*, [1939] S. C. (H.L.) 52. C was accordingly required to re-transfer the shares to S., and to account to him for the dividends received thereon by C, S being required, on his side, to repay the amount paid for the shares by C, with interest thereon from the completion of the sale. The *restitutio in integrum* was, however, complicated by considerations arising from events which had occurred while the shares were held by C. During that period the company had got into difficulties; C, in order to finance the company, had pledged certain securities to a bank; and these securities had been realised at a time when their market-value was low. By way of compromise, it was agreed, with the approval of the House of Lords (to which *Spence* v. *Crawford*, above, went on appeal), that in the accounting between the parties, S should give credit to C for the difference between the market-value of the securities in question when sold and their market-value at the time when the case came before the House of Lords. On these facts the question arose whether the dividends paid to C while he was the registered holder of the shares must now be included for surtax purposes in the total income of S. The Court of Session held that they must. The claim in which S had succeeded was not for damages but for rescission of the contract, with the result that he fell to be treated as having been throughout the proprietor of the shares and entitled, as such, to the dividends thereon. So far, therefore, as the dividends were concerned, what had come into his hands must be considered to be, not compensation or damages measured by the amount of the dividends, but the dividends themselves. It made no difference that in the settlement of accounts a set-off was allowable by S, as explained above, in respect of the loss suffered by C on the sale of securities pledged to the bank for the company's benefit. The account included an item representing the dividends, and the income quality of the dividends was not affected by the fact that the amount actually payable by C was computed by reference to a set-off, any more than it was affected by the fact that several years' dividends were included in a single lump sum.

Surtax—undistributed income of privately controlled company—direction and apportionment—Finance Acts, 1922, *s.* 21, *and* 1937, *s.* 14.—The decisions in favour of the Crown in *Penang and General Investment Trust* v. *C. I. R.*, Tax Leaflet 1127, and *Roomwood Investments* v. *C. I. R.*, Tax Leaflet 1128 (see *The Conveyancer*, December, 1941, at pp. 147—149) have been affirmed by the Court of Appeal (Tax Leaflet 1150).